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C.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SURROGATES' COURTS

OF THE

STATE OF NEW YORK.

BY

THEODORE CONNOLY.

VOL. II.

NEW YORK:
BANKS & BROTHERS, LAW PUBLISHERS,
144 NASSAU STREET.
ALBANY, N. Y.:
NOS. 473, 475 BROADWAY.
1892.

Entered according to Act of Congress, in the year One Thousand Eight Hundred and Ninety-two,
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Rec. Aug. 24, 1892

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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SURROGATES' COURTS

OF THE

STATE OF NEW YORK.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—March, 1889.

MATTER OF CONSTANTINE.

In the matter of the application of LOUIS CONSTANTINE *for letters testamentary of guardianship under the will of* MARGARET CONSTANTINE, *deceased.*

Under section 2852 of the Code of Civil Procedure, a person who is appointed guardian upon the happening of a future event, *e. g.* when he shall attain his majority, who does not qualify within thirty days, or if the Surrogate shall extend the time, within three months after the attainment of his majority, will be deemed to have renounced the appointment as guardian.

PETITION of Louis Constantine for letters of testamentary guardianship, under the will of Margaret

Constantine, deceased, of the persons and estates of certain minor children of the decedent.

The facts appear in the opinion.

RODMAN & ADAMS, *for the petitioner.*

THE SURROGATE.—By the last will and testament of the decedent, admitted to probate June 19, 1883, Andrew J. Constantine was appointed guardian of the persons and estates of the testatrix's minor children until the petitioner herein should become of age; and at that time, he, by the terms of the will, was appointed the guardian of the persons and estates of such of the testatrix's children as should then be minors, and during their minority. The petitioner attained majority on the 9th day of December, 1884, and he now applies for letters of testamentary guardianship.

The application in this aspect is novel, and has never, so far as I am aware, received judicial determination. Section 2852 Code of Civ. Pro., provides: "Where a will containing the appointment of a guardian, is admitted to probate, the person appointed guardian must, within thirty days thereafter, qualify, as prescribed in section two thousand five hundred and ninety-four of this act; otherwise he is deemed to have renounced the appointment. But the Surrogate may extend the time so to qualify, upon good cause shown, for not more than three months. . . . ."

My construction of this section is that the clause "Where a will containing the appointment of a guardian is admitted to probate, the person appointed guardian must within thirty days thereafter, qualify," etc., not only was intended to apply to the case where

a testamentary guardian could qualify under the terms of the will within thirty days, or three months, after the probate thereof, but also applies to the case where the appointment of a guardian is to take effect upon the happening of any contingency; and, in the latter instance, unless he qualifies within thirty days or three months from the date of the happening of the contingency, he is deemed to have renounced the appointment. In the matter under consideration, the contingency happened when the applicant herein attained majority, namely, on the 9th day of December, 1884, which was more than a year after the will was admitted to probate. The applicant, although he has not applied within the time specified in section 2852, nevertheless claims that the court should award him letters of guardianship under the will. The argument which he has made in support of the interpretation which he insists justifies his claim is a very plausible one. The construction, however, which Surrogate CALVIN has put upon the section mentioned in his decision in the Matter of the Estate of Lambrecht, *N. Y. Daily Register*, 23 April, 1881, accords more with the seeming intention of the section, and the interests and security of infants, and should be followed. He held that a failure to qualify within the time prescribed by the section involved the loss of all right under the will to letters of testamentary guardianship. The petitioner having similarly failed to qualify in the present case, his application is denied.

NOTE. The rule was otherwise as to wills proved before September 1, 1880, Geoghegan v. Foley, 5 *Redf.* 501.

ORANGE COUNTY.—HON. ROSWELL C. COLEMAN, SURROGATE.—February, 1889.

MATTER OF HARRIS.

In the matter of the appraisement of the estate of CARRIE W. HARRIS, *deceased.*

A provision in a will by a married woman in favor of her husband will not, unless so declared in express terms, be held to be in lieu of the articles of personal property which under Laws 1887, ch. 630, § 13, the husband is entitled to have set apart by appraisers out of the estate of his deceased wife.

MOTION on behalf of the husband to compel the appraisers to set apart for him certain personal property, pursuant to Laws 1887, ch. 630.

The facts appear in the opinion.

M. J. DONOVAN, *for* FRANCIS HARRIS, *husband.*

N. VAN AMEE, *for* ISAAC R. CLEMENTS *and* SELAH R. CORWIN, *executors.*

THE SURROGATE.—The testatrix by her will gave to her sister Addie N. Robins all her household goods and furniture. Her only provision in the will in favor of her husband is the following:

"I give and devise to my husband Francis Harris the use for and during the term of his natural life, of the said farm owned by me."

Mrs. Harris died December 15, 1888, leaving her husband surviving her, but no children.

At the taking of the inventory, the husband requested the executor to have the appraiser set apart

to him the property which would have been set apart to a widow in the case of a man dying leaving a widow. This the executors refused to do. This motion is made to compel the executors and appraisers so to do.

By chap. 630 of the Laws of 1887 it is provided: Section 13. "When a married woman or widow shall die, leaving her surviving a husband or a minor child or children, the same articles and personal property shall be set apart by the appraisers for the benefit of such husband or minor child or children as is now provided by law in the case of a man dying and leaving a widow or minor children."

I find no adjudication directly upon this statute, but it would seem that the same rules of law are applicable as have been applied to the provisions in favor of widows. The provision for the husband in this will is not made, in terms, in lieu of any statutory rights he may have and "it is an established principle that a provision in a will of a husband in favor of the wife will never be construed by implication to be in lieu of dower or any other interest in his estate given by law." Sheldon v. Bliss, 8 *N. Y.* 31, 35.

So too it has been held that this class of property forms no part of the estate as a subject of bequest. The testator could no more divest his widow of it by will than he could her dower in real estate. Vedder v. Saxton, 46 *Barb.* 188; Sheldon v. Bliss, *supra.*

By the statutes making provision for widows and minors the language in each case is "where a man *leaving a family* shall die." In such case it is therefore necessary to determine in every case whether there was a family. It has been held that a widow

and a female relative living with the deceased at the time of his death constituted a family. By the statute of 1887 however the words "leaving a family" are not used. It is therefore unnecessary to ascertain whether the husband alone could constitute a family.

I am of opinion therefore that there is nothing in the will which deprives the husband of the rights given him by the statute of 1887, and that the appraisers should set apart for him the property mentioned in chap. 470 of the Laws of 1874 and by sec. 2 of chap. 157 of the Laws of 1842.

NEW YORK COUNTY.—HON. RASTUS. S. RANSOM, SURROGATE.—April, 1889.

MATTER OF NICKERSON.

In the matter of the estate of JOHN K. NICKERSON, *deceased.*

Where a person has taken possession of certain personal property belonging to the estate of a decedent, and which he has delivered to others, under a claim that he has done so in accordance with the wishes of decedent, the burden is on such person to show that such property is not still under his control, and in the absence of such proof, his failure to repair his former illegal action is a withholding. The law presumes every act in itself unlawful to have been wrongfully intended until the contrary appears. In such a case, where the respondent is an interloper, who gained control illegally of the property, and has unwillingly disclosed information with reference to its existence and whereabouts, and was disingenuous in answering interrogatories of examining counsel, such person may be charged with the costs of the proceeding to discover the property.

MATTER OF NICKERSON.

PETITION for the discovery of certain personal property belonging to the estate of John B. Nickerson, deceased, and claimed to have been withheld by E. B. Dusenbury, brought under sections 2706 *et seq.* of the Code of Civil Procedure.

The facts appear in the opinion.

MILNOR & WILLIS, *for petitioner.*

BAKER JOHNSON, *for* E. B. DUSENBURY, *respondent.*

THE SURROGATE.—Subsequent to the death of the decedent, the respondent, E. B. Dusenbury, who had boarded in the same house with him prior to his death, took possession of certain personal property belonging to this estate. A portion of this property has since been delivered into the custody of the Surrogate, but was not so delivered until this proceeding was commenced. Two trunks and some jewelry were sent to Maine to certain relatives of the intestate by the respondent, who claims to have done so in accordance with the intentions of decedent as expressed to him. No claim is made that this delivery constituted a gift by the decedent to the consignees. In fact, such a contention was expressly disclaimed by respondent's counsel upon the first argument.

When the matter was first submitted to the Surrogate a memorandum was handed down, by which the proceeding was ordered back to the assistant to take testimony upon the point whether or not this property, sent away by the respondent, is now under his control, and deferring further consideration of the application until such additional proof is taken. Nearly

350 folios of testimony were taken pursuant to this direction.

The respondent gave no testimony tending to show that by any affirmative act of his own he sought to regain possession of the property after he became aware that his possession and disposition of the same had been illegal and in contravention of the rights of the legal representatives of the deceased. I am of opinion that the fact having been established that he was in possession of the property, and disposed of the same in violation of the rights of the administratrix, the burden rested upon him to show that it was not under his control. It certainly cannot be that a presumption arises in favor of the respondent that he is unable to restore the property to its proper custodian. The respondent illegally sent the property out of the state. If he cannot restore it, he is bound to show the reason why. If it is not still under his control, he is bound to show that fact and the reason therefor. Simply showing that he has sent it somewhere does not prove that he has not still dominion over it. It is conceivable that it might have been sent away by him on condition that it would be returned in certain contingencies, *e. g.*, in case of suit against him by the administratrix. To adopt a different rule would be to hold that nothing shall be considered under a person's control except it is in actual physical custody at the moment. Besides, it was peculiarly within the power of the respondent to adduce the proof to establish this proposition, and the elementary rule under such circumstances applies.

But independent of the burden of proof, and apart

from the consideration of what presumption, if any, arises, there is sufficient proof to warrant a finding that, upon the request of the respondent, the property would be restored. In view of this finding, the conclusion is inevitable that the property is under his control. Knowing that by this simple, inexpensive method, without the necessity for resorting to legal process, he could repair his former illegal action, his failure to do so must be considered a withholding.

Upon the question of costs, the controlling fact is that the respondent is an interloper; that he gained control illegally of the property, unwillingly disclosed information with reference to its existence and whereabouts, and was disingenuous in answering the interrogatories of examining counsel.

The costs of the proceeding will be charged against the respondent, for the reason that this investigation would have been avoided had he acted in an impartial and candid manner, and the illegal act was his by which the property was prevented from coming into the possession of the administratrix. The law presumes every act, in itself unlawful, to have been wrongfully intended until the contrary appears, and this presumption is not confined to criminal proceedings, but applies to civil cases as well. Taylor's Evidence, sec. 103; 1 Greenleaf, sec. 34.

His claim of having acted in good faith can only be regarded as a pretence, in view of his failure, after discovering that his conduct had been without warrant of law, to make any effort to regain possession of the property.

CATTARAUGUS COUNTY.—HON. ALFRED SPRING, SURROGATE,—April, 1889.

MATTER OF STRICKLAND.

In the matter of the estate of DAN A. STRICKLAND, *deceased.*

A father mortgaged his farm in 1873, and paid the proceeds thereof to his son, who invested the same. The son paid interest on the mortgage given by the father for some years. Then the son, wished to pay a lower rate of interest, and the father in 1879 executed a new mortgage on his farm, with the proceeds of which last mortgage, the son paid off the former one. The son paid interest on the last mortgage until about the time of his death, in 1882. The son's books showed a final settlement in 1879 with his father, and charged him with the payments thereafter made. There was no allusion in the son's books to the mortgage or to his liability under it, but the testimony established the facts above given. *Held*, that the loans were made for the son's benefit, and that the Statute of Limitations did not bar the father's claim against his estate.

The father also made a claim against the deceased son's estate for services in relation to the care of stock, food for the stock, and board for the son and his servants. It did not appear that any of the items were ever presented to the decedent, and there was no allusion to it in any of his books. The father himself had no account or memoranda showing any of these transactions, but made up his charges solely from recollection. The father and son had at least two settlements, and a note was given as evidence of indebtedness from the son, and money was often paid by one to the other in payment of claims and accounts, yet this claim of the father for services and expenses nowhere appeared. *Held*, that such claim must be disallowed, there being no proof of an express agreement, or mutual expectation of payment.

IN the matter of the personal claim of the administrator against the estate of Dan A. Strickland, deceased.

The facts sufficiently appear in the opinion.

MATTER OF STRICKLAND.

A. D. SCOTT, *for claimant.*

C. D. MURRAY *and* W. S. THRASHER, *for contesting creditors.*

THE SURROGATE.—The claimant is the father and administrator of the decedent—Dan A. Strickland.

The first claim arises out of certain mortgages given by the father, which it is alleged were really for the benefit of the son.

In 1873 the son, then having barely attained his majority, desired to purchase a farm in Otto in this county, called "The Parkinson Farm." To accomplish this the father gave a mortgage on his own farm to one Sally French for two thousand dollars, the proceeds of which were paid to the son. In 1879, Dan A., who was paying the interest on this mortgage at the rate of seven per centum, wished another one given at a lower rate of interest. The father accordingly mortgaged his farm to the Mutual Life Insurance Company for two thousand five hundred dollars, and out of this the son used $2,150 in paying the preceding mortgage and for other purposes, while the father had the remaining three hundred and fifty dollars. The interest on this mortgage was paid by decedent until about the time of his death in 1882, and the mortgage then remained a lien on the farm of the father, except that Dan A. paid one hundred dollars of the principal sum of this encumbrance.

The evidence establishing this is uncontradicted, and clearly shows these loans were for the benefit of the intestate. The contestants' objection that this claim is invalid by reason of the running of the Statute of Limitations is hardly tenable.

The decedent recognized and kept alive the original

debt by paying interest on it from time to time. It was not necessary that these payments be made directly to Strickland as long as they were in recognition of the debt itself. But even if the first loan had become tainted with this defence, it was cured and the debt revived by giving the second mortgage and paying the avails to the son.

The only evidence militating against this demand is that the books of the decedent show a final settlement between father and son in 1879, and after that time the intestate charges the payment of interest made by him to his father; but the difficulty with this lies in the fact that all through Dan's books there is no allusion to the existence of this mortgage or his liability under it although the testimony irresistibly establishes it. So that the inference is very strong that this charge, making a distinctive, unusual one by itself, was not embraced within this settlement and may not have been deemed necessary as long as the mortgage existed as a lien against the father. The payments of interest made by the son and charged to the father would tend to prevent any mistakes arising as to the person actually making them.

On the death of the son therefore there was due claimant the sum of $2,050, less the $1,600, which he credits to him, leaving due to the father $450 and interest thereon since December, 1881.

The next claim of the father is for services rendered by him in taking care of stock for the son, and furnishing him with fodder and grain for the same, and in boarding him and his men.

The intestate was a stockdealer, buying cattle, hogs

and horses, bringing them to his father's farm, and disposing of them from there, or collecting them preparatory to driving them to the cities for market. He carried on this business extensively from his earliest manhood until his death, and the father now presents a claim aggregating nearly two thousand dollars for the assistance he then rendered his boy. The claim does not impress me favorably. There is no proof that any of the items now embraced in this claim were ever presented to the intestate. There is no allusion to them on the books of the son; the father himself had no account or memoranda showing any of these transactions but made up his charges solely from recollection; at least two settlements were had between the father and son and a note was given as evidence of indebtedness from the son, and money was often paid by one to the other in payment of claims and accounts and yet during these ten years there is nothing indicating that the father was making up charges which he expected the son to pay. Claims of this character presented after the death of one of the parties are always viewed with suspicion. Kearney v. McKeon, 85 *N. Y.* 139. No principle of law is better settled than that the foundation for a recovery in such cases must be an express agreement or a mutual expectation that payment is to be made for the services rendered, and many of the circumstances so often alluded to by the courts in rejecting claims similar to Mr. Strickland's, exist quite pointedly in this case. Williams v. Hutchinson, 3 *N. Y.* 312. Robinson v. Cushman, 2 *Denio* 149; Shirley v.

Vail, 38 *How.* 406; Roblee v. Gallentine, 19 *W. Dig.* 153, 154. The claim must be disallowed.

A decree will be entered establishing the first claim at the sum of four hundred and fifty dollars and interest thereon since December 6, 1881.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—April, 1889.

MATTER OF VAN KLEECK.

In the matter of the judicial settlement of the account of ARTHUR T. HILTON *as administrator of the estate of* THOMAS F. VAN KLEECK.

Counsel fees, and such other expenses as may be incurred by an administrator under section 2562 of the Code of Civil Procedure, are actual expenses within the meaning of section 2557 of that Code, and may be allowed to the administrator by the Surrogate, even though the estate out of which they are directed to be paid amounts to less than one thousand dollars.

ACCOUNTING of Arthur T. Hilton, administrator of the estate of Thomas F. Van Kleeck, deceased.

The facts appear in the opinion.

W. R. SPOONER, *for administrator.*

KELLY & MCRAE, *for* ELIZABETH MCINTYRE, *legatee.*

DONALD MCLEAN, *special guardian of* LULU VAN KLEECK, *an infant.*

THE SURROGATE.—The estate or fund for which the administrator is accounting is less than $1,000 in

amount or value. Objections were interposed to his account and the issues raised thereby have been disposed of by the referee to whom the same was referred, and a decree is about to be entered confirming his report and directing distribution of the estate. Application is made by the administrator for an allowance of such sum as may be awarded under section 2562 of the Code of Civil Procedure for the days occupied in the trial, in the preparation of the account, and in the preparation for trial. A question arises whether in view of the limitation of power of the Surrogate to award costs contained in section 2557, any allowance can be made for the services respecting which claim is made by the administrator. The precise question seems never to have been decided.

So much of section 2557 as has any relevancy to the question declares "costs other than actual expenses cannot be paid out of an estate or fund which is less than one thousand dollars in amount or value." Sections 2560 and 2561 relate to awards made solely and strictly as costs. Section 2562 provides: "In addition to the sums specified in the last two sections, The Surrogate may, in his discretion, allow an administrator, ... upon a judicial settlement of his account, such a sum as the Surrogate deems reasonable for his counsel fees and other expenses, not exceeding ten dollars for each day occupied in the trial, and necessarily occupied in preparing his account for settlement, and otherwise preparing for trial."

Section 2557 plainly recognizes the authority of the Surrogate to allow actual expenses, where the estate amounts to less than one thousand dollars in value.

Section 2562 empowers the Surrogate to make the allowances therein mentioned to a party "for his counsel fees and other expenses." Comparison of these two sections shows that such counsel fees, as well as such other expenses as may be properly incurred in the rendition of the services referred to in section 2562, are actual expenses within the meaning of the section 2557, which the Surrogate can allow, although the estate out of which they are directed to be paid does not exceed in amount or value one thousand dollars.

I have indicated on the administrator's cost bill the amount which I have allowed the administrator.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—May, 1889.

MATTER OF CUNARD.

In the matter of the estate of EDWARD CUNARD, *deceased.*

Where, on application of the administrator for discovery of the property of the deceased, for appraisement, the answer of the respondent shows that previous to death of decedent, assets of the decedent came rightfully into the possession of respondent, with the right to dispose of them; and that they have rightfully remained in his hands subsequent to the death of decedent, by virtue of respondent's contract with the representatives of decedent, the application for discovery will be denied.

PETITION of Bach Cunard, ancillary administrator of Edward Cunard, deceased, for the discovery of

property under sections 2706, 2714 of the Code of Civil Procedure.

The facts appear in the petition.

WHITLOCK & SIMONS *for* BACH CUNARD, *petitioner.*

BUTLER, STILLMAN & HUBBARD *for* CHARLES J. FRANKLIN, *respondent.*

THE SURROGATE.—This is a petition by the ancillary administrator of decedent for the discovery of property under sections 2706–2714 of the Code.

The petition alleges that the deceased left a large amount of personal property, consisting of cash and securities, with respondent, and that he now has possession of, or within his knowledge, a large part of the same amounting to about $200,000; alleges demand for delivery and for information concerning the same, and refusal of respondent to comply with the demands.

The answer admits that the decedent left a large amount of personal property of the character mentioned, and that at his death there was personal property in the possession of the respondent. Respondent denies that he was the agent of the decedent, but states that the property was left by decedent in his possession, with authority to use the same as he saw fit in business enterprises and transactions. That after the decedent's death and the appointment of the petitioner as administrator in England, the petitioner filed an inventory in England, which included a schedule of the personal property in this country in the hands of the respondent. After his appointment in England, the petitioner left the property in this country in the respondent's hands and consented that

he should continue in the same relation thereto as he had been before decedent's death. Matters so continued for a number of years.

The respondent states that he paid petitioner $100,000, being his proportion of the decedent's property in this country, and also paid the shares of other persons entitled to distribution, and adjusted the claims of other distributees to a share of assets of the estate in this country. He alleges that all the property of the decedent remaining in his hands was paid to the distributees, as aforesaid, and that nothing now remains in his possession; that since the appointment of the administrator in 1878, the latter has been aware of the property of the decedent in his hands and has had full information with reference thereto and statements of accounts thereof, and that he has gone over fully from time to time the matters in this country with the respondent.

So far as the application for the discovery relates to cash alleged to be in respondent's possession, it must be denied. Matter of Knittel, 5 *Dem.* 371; Matter of Nay, 6 *Dem.* 346.

The application with reference to the discovery of securities remains to be considered.

Counsel for the petitioner claims that, while the answer may be of service in defining the issues to be considered in the examination asked for, it is not sufficient to prevent such examination. He urges that section 2710 provides the only means by which the inquiry may be prevented, viz., by alleging title in the respondent, or claim of possession by virtue of a lien.

Surrogate COFFIN held, in the Estate of Masterson, 6 *Dem.* 460, that an answer, though inartificially and discursively drawn, may entitle the respondent to a dismissal of the proceedings if the court is able to infer from the allegations of fact a claim of ownership or title to the possession of the property.

In the matter of Wing, 41 *Hun* 452, the answer recited that the property, bonds and notes in question were placed in the respondent's hands by the deceased under an agreement between them that the respondent should hold the same as security for such advances as respondent should make to the deceased; that the respondent at the time agreed to make, and did make, such advances; that the deceased never repaid him, and that respondent, as provided in the agreement, disposed of the property in the lifetime of the decedent, and applied the whole proceeds to his reimbursement, and that he had none of the property in his possession.

The very point urged by the petitioner's counsel here was considered by the court, which held (Justice LANDON writing the opinion) that the respondent asserting the *right of possession with the right of disposition*, which right he had exercised, the order of the Surrogate dismissing the petition should be affirmed. In the dissenting opinion Justice PARKER thought that as an answer in the form prescribed by section 2710 had not been interposed, the Surrogate should have permitted the examination to proceed; and then, if the testimony elicited showed that the title to the property was involved, the examination should terminate.

In the Estate of Knittel, 5 *Dem.* 371, the property concerning which discovery was sought consisted of money in the Bowery Savings Bank. Surrogate ROLLINS said: "A decision that the inquiry must proceed could only be justified upon the ground that the representatives of an estate is accorded, by sections 2706–2714, the right to examine a debtor of his decedent merely for the sake of ascertaining the nature and amount of such debtor's liability to the estate. This ground is untenable." He dismissed the proceeding.

In the Estate of Nay, 6 *Dem.* 346, Surrogate ROLLINS held that if the petition is to be interpreted as simply alleging an indebtedness on the respondent's part to the decedent's estate, it must be dismissed, and that an executor or administrator cannot proceed to the collection of an ordinary debt by means of the machinery provided by section 2706 *et seq.*

It will be seen that in the Wing case, at General Term, and in the decision in the Estate of Masterson, it is held that it is not absolutely essential that the answer should be in the strict form prescribed by section 2710. The decision was based upon the ground that the respondent, asserting the right of possession with the right of disposition, which he had exercised, the court considered a sufficient answer was set up.

In the case at bar it appears that the respondent originally came rightfully into the possession of the assets of the decedent, with the right to dispose of them; that they remained in his possession under the same terms subsequent to his decease by virtue of his

contract with the representative of the decedent's estate, and that he has disposed of them in accordance with their arrangement. The two cases seem to me to be alike.

Eleven years have elapsed since the death of the decedent. Shortly thereafter the administrator filed an inventory in England, making the statement of the respondent herein a part thereof. Frequent statements and accounts have passed between the respondent and the administrator, all of which have been acquiesced in. The statute is directed to the purpose of discovering property for the purpose of an inventory and an appraisement. If this application is granted it will virtually be for an inquisitorial purpose.

Application denied.

NOTE. This decision was affirmed by the General Term of the Supreme Court, 54 *Hun* 637.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—April, 1889.

MATTER OF GEHRIG.

In the matter of the judicial settlement of the account of HENRY HUSS, *as executor of the will of* SEBASTIAN GEHRIG, *deceased.*

To entitle a foreign corporation to take a legacy under a will proved in this state, there must be legal proof not only that the foreign corporation has existed, but that it did exist as such at the time of the death of the testator. Without such proof, it is incompetent to take, and the legacy does not fall into the residuum, but lapses as if undisposed of.

MATTER OF GEHRIG.

ACCOUNTING of Henry Huss as executor of the will or Sebastian Gehrig, deceased.

The testator, by his will dated August 13, 1881, disposed of his estate, amounting in gross to about $7,500, as follows: He bequeathed to his only child Katie Gehrig, the sum of five dollars; to the Wartburg Orphan Asylum, one quarter of the residue; to the German Hospital in the city of New York a like one quarter; to the Community of Hochhausen, Circuit Tauberbischofsheim, Grand Duchy of Baden, Germany, a like one quarter, and to Josephine Smith, the step-daughter of a deceased brother, the remaining one quarter. The testator died in January, 1886, and his will was admitted to probate in December of the same year.

JACOB F. MILLER, *for the executor.*

R. M. BRUNO, *for* COMMUNITY OF HOCHHAUSEN, &c.

THE SURROGATE.—The Wartburg Orphan Asylum and the German Hospital, being well-known corporations, have been settled with by the executor. The only question litigated is in regard to whether the Community of Hochhausen, is a corporation and capable of being a legatee.

It is well settled that courts will not take judicial notice of foreign laws, written or unwritten, but that they must be proven like any other facts. Story, Conf. Laws, 527, § 637; the unwritten laws being susceptible of proof by parol evidence. *Id.* 530, § 642. The usual course is, to make such proof by the testimony of competent witnesses, instructed in law, under oath. Monroe v. Douglass, 5 *N. Y.* 447; *Code of*

Civil Procedure, § 942; Hynes v. McDermott, 82 *N. Y.* 41.

This the community has endeavored to do by the testimony of Charles Ferrie, the vice consul of the German Empire in New York city, a gentleman of culture and erudition. He testified that he had, at Berlin and elsewhere, studied the written and the unwritten laws of the states of the Empire, including Baden, and had been an assistant judge in Germany; that he had been in this country for three years; but when he left Germany does not appear; that it is the unwritten law that the community has its mayor and common council and a seal, and has a right to take a legacy. A book was produced and shown to the witness who testified in effect, that it was a volume of the statutes affecting the Grand Duchy of Baden, published by its authority in 1832, as such laws then existed and exist now. One section provided that every "community has a right to administer its affairs as a community, and to manage property independently for itself;" another that all movable and immovable property of communities is the property of the citizens, as a corporation" or "as a body," or "as a whole;" that this and similar communities had their origin in the unwritten law, and had been in existence, as his studies led him to believe, for at least nine hundred years; that these unwritten laws are printed in books or treatises; that the statutes of the Grand Duchy were, prior to 1848, enacted by the Grand Duke, and since then by a legislative body; that the law in respect to this community, as he had, in his official position, been recently informed by the Minister of Baden, has not been changed by any

statute; and that if it had been, he should, by reason of his official position, have been apprised of it; that he had not personally examined to see that there had been no change, but based his opinion upon what some one else had told him, as to the present condition of the law. The witness also read from the book produced, this enactment: "Communities are either cities or townships. No community in existence can be dissolved unless by the legislature." The witness again testified that the book contained all the laws concerning the communities of Baden and that if there had been any change he would know it from his official position. He had examined none of the session laws passed since 1848.

The existence of a foreign law must be proved in the same manner as any other fact. If it be a statute, the book containing it, properly identified, or a duly authenticated copy of the statute, must be produced. If it be an unwritten law which is in question, it may be proven by a person learned in that law. In either case, it must be shown that such law was in force at the time of the event or occurrence to which it is claimed to be applicable; that it is shown to have existed at a time prior thereto, raises no presumption of its continued existence. Hynes v. McDermott, *supra*. Nor can its continued existence be established by hearing evidence, any more than can any other ordinary fact. The usual rules of evidence must govern. All the testimony, therefore, given by the witness, based upon information derived from others having been duly objected to, should be disregarded. The only evidence we have then is, that there was

formerly under the unwritten law of the Grand Duchy of Baden, a community of Hochhausen, with a mayor and a common council, whose duty it was to watch over the interests of its people, and which as long ago as 1832 recognized by statute, as a *quasi* corporation, which could not be dissolved except by legislative action. Since 1848 there has been a legislature of the Grand Duchy, holding annual sessions and passing laws; but what these laws are we have not been informed. Hence, there is no proof of any law, existing at the date of the death of the testator, showing that the community of Hochhausen was a corporation. Without such proof it is not competent to take the legacy, and it lapses; but it does not fall into the residuum, but will devolve as undisposed of. 2 Jarman on Wills (5 *Amer. ed.*), 368 and will pass to testator's daughter.

NOTE. Affirmed by the General Term of the Supreme Court in the Second Department, February 12, 1890.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—June, 1889.

MATTER OF HILL.

In the matter of the estate of HANNAH V. HILL, *deceased.*

Where a claim of the administrator against the estate is assigned by him without consideration, by an assignment which is merely colorable and is referred as a disputed claim, and the administrator fails to interpose the defence of the Statute of Limitations, when such a defence is appar-

ently available, allowing, without objection, incompetent evidence to be offered in support of the claim; in such case the judgment allowing such claim as well as all claims for cost and expenses in connection therewith will be set aside and disallowed.

Such objections may be taken by exception to the report of a referee allowing such item upon an accounting.

An administrator is bound to set up the bar of the Statute of Limitations when it is available, and will not be allowed on his accounting any sum paid upon a debt which at the time of its payment was barred by the statute.

MOTION to confirm the report of a referee and overrule exceptions filed thereto on the judicial settlement of the accounts of the administrator.

The facts appear in the opinion.

HASTINGS & SOUTHWORTH, *for the administrators.*

GEORGE WILCOX, *for contestant.*

THE SURROGATE.—The exceptions relate to three items allowed by the referee; (1) $250 paid for legal services; (2) $120.75 paid for costs, and disbursements in a suit against the administrators; (3) a claim originally owned by one of the administrators, but subsequently assigned to his daughter. For thirty years prior to her decease, the decedent lived with the administrators who are husband and wife; the latter being the sister of the deceased. Subsequent to her decease, one of the administrators (the husband) presented a claim to himself and his wife as administrators, and subsequently assigned the same to his daughter. The matter was referred as a disputed claim under the statute, and the judgment rendered in favor of the plaintiff. This judgment exceeds in a considerable sum the entire value of the estate. The contestant claims that it was obtained collusively, and is void, and that the claim, being that of the ad-

ministrator, could not be referred, but must be proved before the Surrogate on the accounting. The only testimony taken before the referee was that of the plaintiff, and her father and mother, the administrators. It appears from the testimony given by the assignee of this claim, the daughter of the administrator, that she was unaware of the fact of assignment, paid no consideration therefor; and knew nothing whatever with reference thereto. It is clear therefore, that the assignment was merely colorable.

The apparent defence of the Statute of Limitations was not interposed to the claim, or any part thereof, and all the material testimony that would in any way be relied upon to sustain the claim was susceptible to objection under section 829 Code Civil Procedure. Had the former defence been interposed, I am of opinion that certainly the greater part of the claim would have been rejected; and, if the testimony is considered as though the latter objection had been insisted upon, the court would find nothing upon which to base a judgment in favor of the claimant. Reading the testimony taken upon the reference of the claim, and comparing the same with that taken on the accounting herein, I am forced to conclude that the judgment was obtained in such a manner that its authority will not be recognized in this proceeding. "It has become an established rule, settled in the administration of justice, that where a judgment has been fraudulently obtained, it may be either set aside by an action brought for that object, or the judgment itself may be defeated by a defence to any legal proceeding taken upon its authority." Richardson v.

Trimble, 38 *Hun* 410, and cases cited. It is not necessary to bring an action to avoid the record. Mandeville v. Reynolds, 68 *N. Y.* 528. See also Ward v. Town of Southfield, 102 *N. Y.* 287. In Richardson v. Trimble, *supra*, the term "fraud" is defined by Justice DANIELS, writing the opinion of the General Term as follows: "Fraud, in the sense of a court of equity, properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another." 1 Story Eq. Jur., § 187.

The facts I have briefly recited are established by the evidence, and constitute a valid defence to so much of this proceeding as is based upon the authority of the judgment. The failure of the administrators to interpose the available legal defences was such a neglect of duty as to charge them with the damage occasioned to the estate by such failure.

An executor or administrator is bound to set up the bar of the Statute of Limitations, and will not be allowed in his accounting any sum paid upon a debt which at the time of its payment by him was barred by the statute. Butler v. Johnson, 111 *N. Y.* 204. The other items which are the subject of exception were for legal services and costs in connection with the reference of the alleged disputed claim of the administrator. I think they should stand or fall with the determination of the main exception. Exceptions to the referee's report sustained.

ROCKLAND COUNTY.—HON. GEORGE W. WEIANT, SURROGATE.—July, 1889.

MATTER OF RANDELL.

In the matter of the judicial settlement of the account of LYDIA W. RANDELL, *executrix of the will of* JAMES RANDELL, *deceased.*

An executrix took possession of a store which had belonged to the testator, under claim that she was the purchaser of the stock of goods and fixtures, and thereafter conducted the business on her individual account. Objections having been filed to her account by creditors, the issues thus raised were litigated. The creditors sought to charge her with the value of the goods at the time she took possession of the store and offered no evidence as to profits. *Held*, that the creditors could not, for the first time, by their brief filed upon the judicial settlement of the account, charge the executrix with the profits of the business, there having been no evidence offered by them upon that issue.

The claim to an account of profits cannot stand with one that the executrix must be charged with the value of the good will of the business. The two are inconsistent. One proceeds upon a theory that the business was conducted as that of the estate; the other, that the business with the good will passed to the individual benefit of the executrix. She cannot be held for both.

The good will of a business of a decedent is to be accounted for by the executrix, and when the executrix has taken possession of and conducted a store business previously owned by her testator she will be charged with the value of the good will.

The good will of the business of a testator does not include the right to use that testator's name, and where an executrix has not taken the necessary legal steps under Laws, 1880, ch. 561, amended Laws, 1881, ch. 389, allowing the use of the name of a deceased person in business to acquire the right to use such name, she should not be charged for the use thereof as a part of the good will of the business.

Where an executrix, not knowing of the insolvency of an estate has paid certain claims in full, she is, upon her accounting, entitled to credit only for the amount which should have been paid upon these claims *pro rata*, and she loses the excess over that amount paid by her.

Costs recovered by a creditor in an action against the executrix to establish his claim against the estate are entitled to priority of payment over the debts of the testator.

MATTER OF RANDELL.

A note held by an executrix made and delivered to the executrix by the testator as a gift is entitled to share *pro rata* for the amount thereof, and interest thereon from its date, with the other debts of the estate, there being no proof that the same is fraudulent as against the creditors of the testator.

ACCOUNTING of Lydia W. Randell, as executrix of James Randell, deceased.

The facts appear in the opinion.

HENRY G. ATWATER, *for the Mutual Life Insurance Company, creditor.*

EDWARD S. CLINCH, *for* LYDIA W. RANDELL, *as executrix.*

THE SURROGATE.—The testator died on the 22d day of December, 1884. His will was admitted to probate January 21, 1885. The testator appointed his widow the sole executrix of his will. At the time of his death, and for many years prior thereto, he had been engaged in the retail gents furnishing goods business at Nos. 554 and 556 Eighth avenue, New York city. The executrix on about December 26, 1884, caused an inventory or valuation to be made of the goods and fixtures in this store. This was not a statutory inventory nor has any statutory inventory of the estate of the testator been made at any time. The store remained closed from the time of the death of the testator until or about December 26, 1884, when the same was opened and thereafter operated by the executrix. She claims to have then become the purchaser of the stock of goods and fixtures, and thereafter to have continued the business on her individual account. The accounts herein charge the testatrix with this inventory value of these goods and fixtures, and proceed upon the theory that she thereby became the

owner thereof, chargeable with such value, and that the business carried on by her thereafter was her own, and not on account of the estate.

The Mutual Life Insurance Company, a creditor, filed objections to the accounts, and the issues thus raised were litigated.

Many of these objections were general, and I shall not therefore notice them except so far as the same were given some point on the hearings or pressed upon me by counsel in their oral arguments or briefs, the latter of which were fully and carefully prepared.

The most important question presented arises upon the claim that the executrix should be charged with the value of the good will of the testator's business.

Before giving this question consideration, I deem it best to dispose of the claim which, for the first time, is presented by the brief of counsel for the contestant, that the executrix should be charged with the profits made by her in the business since the death of the testator. As remarked, this claim was not made upon the trial, and it was not litigated. If it be assumed, however, that there was no sale of the goods to the executrix, or if one, that it was illegal and that she is liable to account for such profits, there is no evidence upon which to predicate an intelligent finding of profits, and if such there were, the amount of the same. This subject was not gone into at all for that purpose. The inquiry as to purchases, sales and expenses in the business was confined to the testator's lifetime except for one year, and as bearing only upon the value of the good will. The value of the goods and fixtures as fixed by the inventory was,

by express assent in open court, taken as the sum with which the executrix should be charged. No attempt was made to follow the property nor to inquire into any after acquired property in the business as being the property of the estate for which the executrix was accountable or for the use or profits of which the estate was entitled.

For these reasons the claim should now be disallowed.

But the claim to an account of profits cannot stand with the one that the executrix must be charged with the value of the good will. The two are inconsistent. They cannot stand together. One proceeds upon the theory that the business was continued as that of the estate; the other that the business with the good will passed to the individual benefit of the executrix. She cannot be held for both. If the business was as matter of legal right that of the estate, then the good will must, also, have gone to the benefit of the estate and its value passed in enhancement of profits. The contestant has tried the issue resting upon the claim of the liability of the executrix for the good will, and should now be held to that election.

Having therefore reached a conclusion adverse to the claim of profits and that the continuation of the business must be regarded as that of the executrix individually, I shall now proceed to the consideration of the question as to whether or not she is chargeable with the value of the good will.

As to this I am of the opinion that she must account for the same. It was in contravention of a well established rule of law, that one acting in the fiduciary

capacity shall not deal with the trust estate to his individual benefit, that the executrix took to herself the property of her testator in the manner that she did, and upon proper election I think the business must have been treated as that of the estate. That not having been done, however, she is nevertheless liable to account for all property of the testator of which she has availed herself, including the good will.

It appears from the authorities, that the good will of the business of a merchant is an asset to be accounted for by an executor or personal representative. In Hitchcock v. Coke, 6 *Adolph & Ellis* 438, Chief Justice TINDAL says it "is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of a personal representative of a trader." This case is cited with approval in Howe v. Searing, 19 *How.* 14. The law was so stated by Lord HARDWICKE in Gibblett v. Read, 9 *Mod.* 459, and so held by Lord KENYON in Worral v. Hand, *Peake's N. P.* *74.

I do not think, however, that this good will includes the right to use the name of the testator.

While under the common law, in the absence of fraud, it may not have been illegal to trade or do business under a fictitious name or in the name of a deceased person, still it would seem from authority that the right to use the name of an old firm or trader did not pass as a part of the good will. Howe v. Searing, *supra*; Morgan v. Schuyler, 79 *N. Y.* 490. And I find no case that holds that there is a right to use a name that survives and constitutes an asset for which a personal representative is accountable. The cases of Hegeman v. Hegeman, 8 *Daly* 1, and Glen

and Hall Mfg. Co. v. Hall, 61 *N. Y.* 226, are not adverse to this conclusion. The latter is rather a case of trade-marks than of good will. It relates to the right to use the name of a place or property or of an article or thing and not the name of an individual or person. The former held that the name could not be used as the name of the existing firm. Good will is generally described as a "probability that the old customers will resort to the old place." Justice STORY describes it as "the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein," etc. *Story on Partnership*, § 99, and on the question as to whether the right to use the firm name is part of the good will says: "But it has been thought that this right, however valuable, does not fall within the true character and nature of good will." *Id.*, § 100. Good will is connected with the place rather than the person and is an incident to the ownership of or rights to occupy or use property. Morgan v. Schuyler, *supra*.

But, however, this may have been prior to statutory enactment as to the use of fictitious names or the name of another, the fact that such use of names is now prohibited by statute must eliminate from consideration the right to use the name of the testator in determining what shall be held to be the good will for which this executrix is chargeable.

By chapter 281 of the Laws of 1833 it was enacted that no person should thereafter transact business in the name of a partner not interested in the firm or use the designation "and Company" or "& Co."

unless it should represent an actual partner. This enactment prevented any person from doing business in the name of another or under a fictitious name. This statute has been construed as of general application, and applies to persons in existence, as well as where a partner has retired or is dead. Howe v. Searing, *supra;* Hegeman v. Hegeman, *supra;* Wood v. Erie Railway Co., 72 *N. Y.* 196.

By its provisions, a violation of this statute is made a criminal offence, and, also, by section 363 of the Penal Code, except in case of one of the authorized use of such names provided by statute. All subsequent legislation on this subject is in modification of this act of 1833 or in limitation thereof, or to relieve from its effect.

Chap. 347, Laws of 1849, modified the same as to copartnerships located in foreign countries. Chap. 400, Laws of 1854, made provision for the continuation of the use of partnership names under conditions therein prescribed. Chap. 256, Laws of 1868, conferred the like power as to limited partnerships. Then follows chap. 561, Laws of 1880, as amended by chap. 389, Laws of 1881, which provides that in certain cases the right to use the name of a deceased resident of this state for the purpose of continuing and carrying on such business shall survive "and that in all cases where the right hereby given is exercised, such right to the use of such name shall form a part of the personal estate of such deceased, and shall pass or be disposed of, and accounted for as such." Now it is contended that the value of the right under this act should be accounted for by the executrix either as

a separate asset or as a part or element of the good will. But as we have already found, the use of a fictitious name or that of a deceased person is illegal and cannot therefore form any part of the good will.

Is she then liable to account for the value of the right to use the name under the act of 1880? I think not. First, because the evidence is insufficient to establish that she has used the *name* of the deceased. It is true the name of "Randell" was used, but that was also her name. Besides it was rather a designation of the name of the place. Second, because I think she is only liable in the event that she *exercised* such right in accordance with the statute.

The statute confers the "right to use the name" of the deceased person in the cases therein provided, and after conferring such right, provides that "in all cases where the right hereby given is *exercised*, such right to the use of such name shall form part of the personal estate of such deceased and shall pass or be disposed of and accounted for as such."

To hold that the executrix is liable to account for the use of the name in the event that such use is exercised without filing the certificate specified in the statute is equivalent to holding that the Legislature intended reviving or conferring the right to do business under a fictitious name and contrary to public policy without providing any safeguard for the protection of the public. This statute should be read and construed in connection with the general statute prohibiting the doing business under fictitious names. And such statute should not be held abrogated except

by express repeal or clearly inconsistent subsequent enactment.

Nor could it have been the intention of the Legislature to hold a person liable for the value of the use of the name of a deceased person as a part of his estate and at the same time make it illegal to use the name. It is rather to be presumed that the use of the name without filing the certificate is still illegal, but when such use is in accordance with the law requiring the making and filing of the certificate then such right so exercised must be accounted for as a part of the personal estate. It is the using of the name of another and not the failure to make and file the certificate that is declared illegal and made a crime. Penal Code, section 363. Nor again is it to be held that the Legislature under this act, unless it clearly appeared otherwise, intended to depart from its purpose as manifested in its other enactments on this subject to make the execution and filing of the certificate a prerequisite to the lawful right to use a fictitious name or that of another in the transaction of business.

The words, "and the right hereby given may be exercised under the provisions of this act in the cases of all such persons who have died within five years last past," import that it is the right exercised under or in accordance with that act which is to be accounted for as an asset. It is not to be presumed that the Legislature, in the absence of words or reasons to the contrary intended the enactment of any rule for those instances of death in the past and another for the future.

It would seem however, that this statute was en-

acted to only enable the estates of deceased persons to be settled up in a more advantageous method financially, and not to continue the names of deceased persons indefinitely at the head of business houses. It is frequently the case that most money can be realized from an estate by a continuance of the business of the deceased for a time, and it is not infrequent that a testator directs in his will that his business be continued to carry out his purposes as to the disposition of his property, and the use of his name might prove highly beneficial in these respects. It was for such cases undoubtedly that the Legislature intended by this act to provide. But did it intend to authorize an unlimited and indefinite use of the name? The language of the statute, "the right to use the name of the deceased for the purpose of continuing and carrying on *such* business shall survive," somewhat authorizes the inference that only the conferring of the right to this limited use was the purpose of the Legislature.

As lending some force to this construction it is to be noticed that the language of this act of 1880 does not in terms provide for the filing of a new certificate in the event of a change of persons exercising the right to use the name of the deceased person, while the acts of 1854 and 1868 above alluded to provide that, "*On every change* of the person or persons continuing the use of such name he or they shall sign a certificate," etc. Again the absence of such words as "Assigns or appointees" which we find in the act of 1854, may lend a further circumstance to sustain this view of the statute.

And was it the purpose of the Legislature to au-

thorize and continue the use of the name of a deceased person after his own estate is settled, and have the right to such use to pass into the charge of strangers who might bring his name into disrepute and place it upon the legal records as the name of a bankrupt or every fraudulent trader, or to barter it away as his property to a new purchaser? Was it the legislative intent to compel such disposition of the names of deceased persons as might result to the annoyance and disgrace of his living relations? This far-reaching undesirable public policy is not to be imputed to the legislature without being clearly expressed.

However it is the right *exercised* under this statute of 1880, and in accordance with its provisions that is to form a part of the personal estate and to be accounted for, and such right not having been exercised within the view I have taken of the evidence and first above advanced as to the construction to be given to the statute, the executrix is not to be charged with any value for the right to the use of the name of the deceased.

But it may be that I am in error in the impression I entertain as to the limited construction to be given to the statute as last above advanced, and if so, the right to use the name of the deceased would still remain as an asset to be sold or otherwise disposed of by the executrix. I shall therefore leave that matter open for the parties interested to take such proceedings as they may be advised as to the disposition of such right, if any, and if disposed of, subject to a further accounting for whatever may be realized on such disposition.

This brings us to a consideration of the amount which the executrix shall be charged for the good will without the right to the use of the name of the deceased.

This value of the good will must be determined as of the time when the executrix took the stock of the store and proceeded to carry on the business as her own, which was about December 26, 1884.

This value must be based upon the then existing circumstances and conditions. Evidence has been adduced as to the character and extent of the business up to the time of the death of the testator and for a year thereafter: as to whether or not the same was profitable and the general results thereof: the length of time of the unexpired lease: the chances of obtaining a renewal of the lease and the terms thereof: the changed conditions of trade and many other circumstances all having a more or less important or remote bearing upon this question of value.

To aid me in forming a just estimate of the value of the good will there was but one witness called, Mr. William J. Golding, to advance a judgment as an expert. He impressed me as an intelligent and fair business man. His opinion was taken upon different phases of the question, based upon hypothetical statements of facts, many of which indicated an assumption of creditors and circumstances which cannot fairly be considered in reaching an estimate of the fair and true value of the good will as of the time and under the circumstances existing when the executrix took to herself the benefit thereof. Elements and circumstances that are speculative and of so uncertain a

character or nature as to not carry with them the element of reasonable probability, should be excluded from the basis for a true judgment.

After a careful review of Mr. Golding's testimony and taking his answers given to questions which came the nearest to an assumption of the true and legitimate facts and circumstances which should enter into a correct judgment, I find his answers wherein he says that two or three thousand dollars, and from twenty-five hundred to three thousand dollars, are most nearly the value of the good will, I therefore take the estimate of twenty-five hundred dollars as being most nearly the true estimate.

But this is qualified by his testimony that in making this valuation he includes the right to use the name, as I infer, in fixing the valuation of the good will of $5,000 to $7,000 for a five years' continuation of the lease and business. This upon about the same ratio that the $2,500 bears to the $5,000 or $7,000, would detract from the $2,500 to the extent of about $800, and leave the value of the true good will at $1,700, which sum I accordingly fix as the value thereof with which the executrix must be charged. The executrix has no just cause to complain of the accuracy of the amount of this charge; if there is indefiniteness as to the value of the good will it is chiefly due to her failure to follow her line of duty as executrix. She should have promptly sold the lease, business and good will, and she would then have been charged only with the sum realized on such sale.

As to the claim of the executrix against the testator on the $2,500 note dated May 10, 1879, I am

of the opinion that under the evidence it is established that she is a creditor to the extent of the amount thereof and interest thereon from its date, and that she is entitled to share *pro rata* thereon with the other creditors on the distribution.

Even if the note were a gift, I think this is so, as no attack is made upon the same as fraudulent as against the creditors of the testator. If such a claim were made, its being a gift would not alone necessarily invalidate the note. Jackson v. Badger, 109 *N. Y.* 632; Bucklin v. Bucklin, 1 *Abb. App. Dec.* 242; Phillips v. Wooster, 36 *N. Y.* 412.

The case of Isenhart v. Brown, 2 *Edw. Ch.* 341, I do not consider as in conflict with this conclusion.

The obligations given by the testator in that case were made at such time and under such circumstances as to warrant the finding that they were invalid, as to creditors for valuable consideration.

But there is some evidence which would seem to authorize the inference that Mrs. Randell had some interest in the life insurance policy cashed by the insurance company for the testator. Within a few days after he received the money he gave this note for approximately the same amount. Mr. Dow testifies that the note was given for the money Mr. Randell got from the insurance company. The note was by direction of the testator entered in his account book among his bills as a liability. The note itself imports an indebtedness which has not been overthrown.

The claim of the Mutual Life Insurance Company, that the costs recovered by it in its action against the executrix to establish its claim against the estate are

entitled to priority of payment over the debts of the testator, I think is well founded. Both upon principle and authority this is so. Estate of Douglass, 3 *Law Bulletin*, 32; Shields v. Sullivan, 3 *Dem.* 296; Hall v. Dusenbury, 38 *Hun* 125; Columbia Ins. Co. v. Stevens, 37 *N. Y.* 536. The costs recovered by a creditor in an action brought to establish a claim are not in fact any part of the debt of the deceased. The order of payment of claims against the estates of deceased persons prescribed by the statute applies to the obligations of the deceased. True the costs are merged in and form part of the judgment, and ordinarily enforcement of the payment thereof goes with enforcement of the judgment. But in proceedings for payment out of or against particular funds or properties this is not always so; and where equitable principles require it payment of costs should be made separate from the debt. No law prohibits this in the case of the settlement of the estates of deceased persons, and where expense is imposed upon a creditor to enforce his claim by resistance thereto made in the interest of the fund or property or those entitled to the same, I do not see why such creditor should not be first reimbursed to the extent of the costs awarded him for such reimbursement. It is but the marshaling and disposing of funds or properties in court upon principles of equity where no fixed rules of law intervene to the contrary.

The case of Shute v. Shute, 5 *Dem.* 1, seems to hold that such costs have no priority. I think, however, that the learned Surrogate may not have given the question his usual careful thought.

In making distribution of the assets that shall appear to be applicable to the payment of the debts of the testator, all debts that have been established either by failure to reject or otherwise must share, *pro rata*, including such as may have been paid by the executrix out of her own moneys. The claim of the contestant that such debts as the testatrix may have thus paid shall not be permitted to share in the distribution is neither equitable nor legal. Stillwell v. Melrose, 15 *Hun* 378; *Redf. Surr. Practice*, 511.

The principle of voluntary payments does not apply. There is no doubt but that when she paid these debts the executrix supposed that the estate was solvent. She made a mistake in so doing, and for this error she must lose to the extent that she has paid such claims over and above the amount applicable to each upon the distribution. She cannot, however, be reimbursed for any over payment.

The claim of Dr. Joseph M. Finch has no preference. It is a general debt of the testator, and must be paid as such.

Costs to each party to be taxed upon bills to be presented. Let a decree be presented for settlement and entry accordingly.

CAYUGA COUNTY.—HON. JOHN D. TELLER, SURROGATE.—September, 1889.

MATTER OF KEELER.

In the matter of the estate of MORRIS KEELER, *deceased.*

Costs cannot be allowed out of an estate to an unsuccessful contestant of the will (Code Civ. Proc., § 2558), and the court being without jurisdiction to so decree, a consent of the parties to the award of such costs to the unsuccessful party cannot confer jurisdiction.

Correspondence between the counsel for the parties as to the amount and manner in which the costs shall be decreed, containing propositions not accepted, together with a subsequent verbal acceptance, does not comply with the rule of the courts (Rule 11) that such agreement shall be in writing, and is not binding.

Where a contest of a will is made in good faith and on substantial grounds, the proponent's costs will be paid out of the estate and not by the contestants personally, especially where contestants fail to appear at the trial for the reason that they relied upon a settlement proposed by the counsel for the proponent being carried into effect.

APPLICATION by the proponent of the will of Morris Keeler, deceased, for costs, and asking that costs be allowed as against the contestant personally.

W. D. SHUART *and* FRANK S. CURTIS, *for the proponent.*

S. EDWIN DAY, *for the contestants.*

W. E. HUGHITT, *special guardian, for the infant.*

THE SURROGATE:—This is an application for costs by the proponent of the will of the decedent, asking that costs be allowed as against the contestants personally. The contestants also ask an allowance of costs from the testator's estate, claiming the right thereto by virtue of an alleged stipulation of counsel.

The proceedings for probate of the will resulted in a decree of this court, denying probate and awarding costs to both parties from the estate. An appeal was taken to the General Term of the Supreme Court, where the decision of this court was reversed, and a trial upon questions of fact before a jury ordered. Upon the second trial, no opposition was made to probate and a verdict was rendered in favor of the proponent upon all the issue submitted.

After the decision upon appeal and prior to the second trial, correspondence was had between William E. Hughitt, Esq., who had appeared in the proceeding as special guardian for one of the contestants (a minor), and for no other party to the proceeding, as he states in his affidavit now presented, and William D. Shuart, Esq., counsel for proponent, in regard to a settlement of the litigation. There had been an interview between these parties relating to this subject; and, on April 11, 1889, the special guardian wrote Mr. Shuart as follows: "Dear Judge. I saw Judge Day Tuesday and further conferred with him about the matter of my talk with you at your office. We suggest as follows: We to be allowed our costs as per judgment of Surrogate's Court of December 27, 1887. In like manner our costs and disbursements since. In addition that there be paid our side, say $3,000. It seems to us that you would think this much better than to litigate further," etc.

April 15th, Mr. Shuart replied: "I feel that I could not advise my client to accept your proposition. Of course the costs of the special guardian will be allowed all through the proceedings whatever may be the

result, but not quite so with regard to the other costs. Yet I feel that if the litigation could be terminated without the labor of a protracted and hard-fought trial it would be to the advantage of our client to pay all of the contestant's costs, that allowed by the Surrogate's Court and referred to by you, & all other costs, and so should make no opposition to the old bill of Judge Day to which you refer. . . . . We think if the contestants' costs are all allowed, and the bill of Judge Day, that they ought to claim nothing further of the old lady." A letter of explanation was written in reply on the 17th of April, to which proponent's counsel on the 18th of April answered: "We do not see how we can vary our proposition sent the other day."

On April 20, 1889, the special guardian wrote: "You have left me in a hole. I thought I was warranted from our personal interview in reporting to clients that you would advise the payment of something. 'Judge Day's old bill' was only mentioned in my letter so that it might not appear to be confounded. He does not regard its payment as any concession. . . . . I cannot think taxable costs only were in your mind at your interview. I certainly did not so think. I hope you will let me out by offering something besides taxable costs."

April 23d, Mr. Shuart replied: "I did have in mind the propriety of paying your people something besides taxable costs when we had our interview. . . . . I will talk the matter over with my client and ascertain just what her feelings are in the matter. Do not let this prevent you from making such ar-

rangements as you may deem necessary at the trial of the action at the next circuit, although I shall be quite pleased if, after a conference with my client, we find some way to help you out." On April 29th, he again wrote: "I was at Moravia last Friday and had an interview with my client, the result of which is to leave no other way than for us to try the case, unless you are willing to accept the proposition contained in our letter of April 15th."

On the 4th of May, the special guardian wrote in reply: "I have little doubt but that your offer *will be accepted*. . . . . Assume that the best way will be to await your arrival on Monday, or later if you desire. Under all the circumstances we expect you will allow the costs at a liberal rate."

The foregoing are all the contents of the letters between these parties, which it is deemed material to quote. Upon the following Monday, the first day of the Cayuga Circuit, the parties to the correspondence met at Auburn and had an interview, as to the details of which there is now a dispute. Mr. Hughitt presents his affidavit in which he says he was then told by Mr. Shuart that some of the Keelers would not consent to said settlement, and he replied the arrangement must be carried out, that Judge Day so understood it, and he had authority from him for it; that Mr. Shuart, after some further conversation, said proponent would do as he had proposed if there would be no contest before the jury, that he, deponent, assented, and that said arrangement was fully carried out on contestants' part, relying on said promises of said Shuart.

Mr. Shuart presents his affidavit, in which he states that he did not say to said Hughitt that the proponent would do as he proposed, if there should be no contest before the jury. That he did say that William E. Keeler, one of the contestants, declined to accept the proposition which had been made by him, and that therefore there could be no settlement as proposed. That he had been definitely informed by said Keeler that the other contestants declined to make any compromise or settlement unless proponent would pay them, in addition to their costs, the sum of $200. That such proposition was rejected by him and no agreement to compromise or settle was consummated, and that he did not understand Judge Hughitt as accepting the proposition of settlement. He also says in his affidavit, that just before coming into court he had been told by William E. Keeler that there could be no settlement unless $200 was paid in addition to all costs, and that he (Keeler) had received instructions from Judge Day to have the matter appealed and to have the papers prepared by Willim E. Hughitt, and that the papers would be served upon proponent's attorney before the case could be tried.

Judge S. Edwin Day was attorney of record and represented all the contestants except the one for whom Judge Hughitt appeared as special guardian. He took no part in the correspondence, so far as is shown, and did not appear upon the second trial, (at the circuit.) His affidavit is read, in which he states that he relied on the arrangement stated in the affidavit and letters, (except that of May 3d,) and that in consequence he did not appear at the May Cayuga

Circuit, and none of the contestants, so far as he knows, then appeared.

Since the trial, each party has served a bill of costs upon the attorney for the other party, and the question of allowance is presented upon the cross applications.

I do not think there has been shown to be such a stipulation as would authorize this court to allow costs to the unsuccessful contestants. Prior to the letter of May 3d, above referred to, there certainly was no agreement between the parties. The contestants asked as a condition of withdrawing their objections, an allowance of money in addition to taxable costs. The letter of Mr. Hughitt of May 3d, does not contain a positive acceptance of the offer of proponent's counsel, but merely a statement that he had "little doubt but that your offer *will be* accepted." Certainly the minds of the parties had not met prior to the interview at the court house the day of the trial. I am convinced that before any agreement was made the counsel for the proponents was told by one of the contestants that the proposed settlement would not be accepted, and that the counsel notified Judge Hughitt that, in consequence of this contestant's declining to accept the proposition, there could be no settlement. Whether it was thereupon agreed between counsel that the proposition contained in the letter of April 15th should be carried out, may not be necessary to determine, for the reason that any agreement then to be made requiring the assent of both parties, and to be binding should have been reduced to writing and subscribed by the party against whom it is alleged, or

by his attorney or counsel. (Rule 11.) I do not think a letter of an attorney, proposing terms of settlement, which are withdrawn before acceptance, can be held to be such evidence of a subsequent agreement as this rule requires. The object of the rule was to avoid the unpleasant duty of a court in weighing conflicting affidavits to determine the truth of statements made by attorneys in proceedings like the present.

As to whether counsel promised that the proponent would do as he proposed if there should be no contest before the jury, there is a flat contradiction in the affidavits. That the contestants consider it necessary to prove there was such a promise is confirmatory of the position that the assent of both parties at that time was deemed essential. Such agreement not appearing by written evidence cannot be held to have been binding.

If the alleged agreement had been made and properly evidenced, I do not think this court would be at liberty to enforce it, in view of the statute upon the subject of costs. Section 2558 of the Code provides that, when a decree is made upon a contested application for probate or revocation of probate of a will, costs payable out of the estate or otherwise shall not be awarded to an unsuccessful contestant of the will, unless he is a special guardian for an infant. It is a well established principle of law that jurisdiction of the subject matter involved in an action or legal proceeding cannot be conferred by stipulation, and when the law-making power prescribed limits or conditions to the authority of a court, they cannot be dis-

pensed with by litigants. Griswold v. Sheldon, 4 *N. Y.* 580; McMahon v. Rauhr, 47 *N. Y.* 67; Davisburgh v. Knickerbocker Ins. Co., 90 *N. Y.* 526. This court has no jurisdiction of the subject matter, the thing in dispute, the allowance of costs to unsuccessful contestants upon the probate of a will,—and consent of the parties would not confer such authority.

As to the matter of an allowance of costs to the proponents, it lies within the discretion of this court to determine whether they shall be paid out of the testator's estate, or be decreed to be paid by the contestant personally. (Code, § 2553.)

There is not proof to vary the impression formed upon the first trial, that the contest was made in absolutely good faith, and with sufficient grounds.

The imposition of the burden of the payment of costs upon the contestants in these circumstances, simply because the will has been finally adjudged to be valid, would be contrary to precedent and unjust. Moreover I am satisfied that the attorney for the contestant failed to appear at the circuit, at which this case was tried, for the reason that he relied upon the arrangement, proposed by the counsel for the proponents, being carried into effect. The conclusion is also unavoidable that the proponents' counsel must have known that fact, when proceeding with the trial; and, although the proponents may not be bound by any stipulation, the facts, which are uncontroverted, are sufficient to require the court to direct the payment of the costs of the proponents out of the testator's estate.

The costs of the special guardian, prior to the ap-

peal to the General Term, are allowed at the amount originally taxed. Subsequent costs are denied for the reason that the ward became of full age prior to the appeal, and had no further need of a guardian.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—September, 1889.

MATTER OF LAWRENCE.

In the matter of the judicial settlement of the account of ADRIAN VAN SINDEREN, *executor and trustee of the will of* WILLIAM LAWRENCE, *deceased.*

The premium derived from the sale of securities in which the principal of a trust fund is invested, should be credited to the principal account, to go eventually to the one who shall be entitled to receive the corpus of the estate, and not to the income account, payable to a life beneficiary.

On a payment which a testamentary trustee is ordered to make by a decree, simple interest and not interest with annual rests, nor compound interest should be charged.

ACCOUNTING of Adrian Van Sinderen, executor and trustee of the will of William Lawrence, deceased.

The facts appear in the opinion.

ALEXANDER & GREEN *and* FREDERICK R. COUDERT, *for trustee.*

HOFFMAN MILLER, *for* WILLIAM E. LAWRENCE.

ALFRED BACH *and* WALTER L. MCCORKLE, *for* ISAAC LAWRENCE *and* SARAH L. MOSER, *contestants.*

RUFUS L. SCOTT, *for* ANN S. HOLYWELL.

THE SURROGATE.—I have examined this case care-

fully, and such matters as have been presented in a shape to enable me to consider them, I have disposed of. The others, however, are left in such a condition, owing to the confused manner in which they are submitted, that I am obliged to defer their determination. The report of the referee consists of opinions and findings, facts and evidence, so commingled and run together as to make it extremely difficult, if not impossible, to ascertain definitely the grounds upon which he bases his conclusions, or to test their accuracy or correctness; and he has made contradictory findings of fact, no doubt by inadvertence. The report must be sent back for the purpose of having the referee state his conclusions of fact and law separately, and entirely dissociated from his opinion.

The amount of $462.63, respecting which the contestant, William E. Lawrence, filed his fourth objection, was not included in the trustee's accounts, and very properly so. The amount was adjudged to be paid to the objectant by the decree made upon the former accounting, and was an adjudication and a determination enforceable in the usual way, in which any other money decree or judgment could be enforced. Sections 2,553–2,555, Code Civ. Proc.; Laws 1837, c. 460, §§ 63, 64, as amended by chapter 104, Laws 1884; People v. Marshall, 7 *Abb. N. C.* 380. Obviously, simple and not compound interest could be charged on the amount of the recovery. What defences might be successfully interposed to the attempted collection of its amount, could be set up when the attempt to enforce it is made in a proper proceeding. If any claim were made herein by the

contestant that payments to him which the trustee seeks to charge against funds, or for which he is now accounting, were not so paid, but paid on account of the moneys directed to be paid by the decree, it would, of course, be necessary to take into consideration such moneys in ascertaining the fact, and determining the extent of the interest of the contestant in the moneys now being accounted for. In no aspect of the case, however, can compound interest be awarded on the amount directed to be paid by the decree, or annual rests be taken in computing the interest. The account prepared by the referee, will, he having allowed interest with annual rests to be charged on such amount, have to be readjusted.

The eleventh finding of the referee, respecting the profits upon the sale of the United States securities, forming part of the trust fund to whose income Isaac Lawrence is entitled, is plainly wrong. This profit is credited to the income account, and allowed as income to the beneficiary. It should have been allowed as income to the trust fund and goes as part thereof to the party or parties eventually entitled to receive the *corpus*. The referee has found that the decree in the previous accounting is binding upon the other parties, but not upon Isaac Lawrence, as he was not cited to attend such accounting, and was not otherwise before the court in such proceeding. The proof of service of citation shows that he was served with the citation. It was, notwithstanding this, competent to show such was not the fact. Ferguson v. Crawford, 70 *N. Y.* 253. I do not decide whether the evidence was or was not sufficient to justify his finding in this

regard. Nothing is now determined by me save the questions involved in the fourth objection of William E. Lawrence, and the eleventh finding of the referee, hereinbefore considered. I refer to the finding for the purpose of stating that while the referee has made this finding, he has not indicated with sufficient explicitness the particular matters affected by it.

I am unable to ascertain definitely from the exceptions filed by the trustee whether any exception is intended to be interposed to the disposition which the referee has made of so much of his report as deals with the mortgage for $1,000 made by William E. Lawrence to the accounting party. The latter's thirty-sixth exception, which attempts to raise questions respecting the disposition made by the referee of items of the account, is too general and indefinite. It seems to have been made for the purpose of enlisting the ingenuity of the court in a career of exploration and discovery which it is the duty of the counsel to wholly undertake himself. This exception is therefore not available. When the referee shall have returned to the court his report with the proper findings the counsel will be expected to submit anew such exceptions as they may wish to file, as I shall consider those already filed, except to the extent that they relate to the questions which I have herein disposed of, as not before me for consideration. The purpose of this is to prevent confusion, and to have the issues presented to the court for decision plainly and precisely defined and indicated.

CATTARAUGUS COUNTY.—HON. ALFRED SPRING, SURROGATE.—September, 1889.

MATTER OF BOYLE.

In the matter of the estate of PETER BOYLE, *deceased.*

The recovery of a judgment for costs by a defendant against the administratrix of a decedent, in an action brought by her to recover damages for injury by negligence to property of deceased does not give defendant any priority over the other creditors of the intestate.

And before an execution issues in such case, it should appear that there are assets sufficient to pay all the debts of decedent or, at least, an account should be filed, showing fully the assets and debts to be paid therefrom, so that the execution would direct only the application of the "just proportion of the assets" of the estate to the payment of the judgment.

APPLICATION for leave to issue execution.

SPRAGUE, MOREY, SPRAGUE & BROWNELL, *for motion.*

E. D. NORTHRUP, *in opposition.*

THE SURROGATE.—The administratrix of Peter Boyle, deceased, commenced an action in the Supreme Court against the New York, Lake Erie & Western Railroad Company to recover the value of certain horses belonging to decedent, and which were claimed to have been killed by the negligence of the defendant.

Plaintiff failed ultimately in the litigation, and a judgment for costs of over four hundred dollars was entered against her as such administratrix. Application is now made on behalf of the railroad company

for leave to issue execution on this judgment to be enforced against the property of decedent.

I do not think the motion should be granted at present.

The recovery of this judgment did not give defendant any priority over the other creditors of the intestate. See Schmitz v. Langhaar, 88 *N. Y.* 503.

And before an execution issues, it should appear there were assets sufficient to pay all the debts of decedent, or at least an account should be filed showing fully the assets and the debts to be paid therefrom, so that the execution would direct only the application of the judgment debtor's "just proportion of the assets" to the payment of this judgment. Sections 1825, 1826, and 2723, subd. 1, Code of Civil Procedure; Sippel v. Macklin, 2 *Dem.* 219; Peters v. Carr, *Id.* 22.

In no other way can the scheme for the enforcement of judgments recovered in other courts be made practical when the execution is to be collected out of property left by a decedent.

CAYUGA COUNTY.—HON. JOHN D. TELLER, SURROGATE.—September, 1889.

MATTER OF CRISE.

In the matter of the judicial settlement of the account of HENRY G. CRISE *and* D. PULASKI MERSEREAU, *executors of the will of* WILLIAM CRISE, *deceased.*

To create a trust, the acts or words relied upon must be unequivocal, and where a different interpretation may with equal possibility be placed upon the transaction it will not be proper to draw the inference that a trust is intended which divests the donor of all further ownership of the property.

The testator delivered to one A, who had acted as his agent in various matters, a sum of money, and took from him a receipt, which stated that he had in his possession a specified sum in trust from testator to invest for the benefit of his daughter Mary Ann Hillman, the interest of which only to be paid to her when the testator "thinks she needs it for the benefit of herself or child."

A receipt in the handwriting of A, the agent, was presented to the daughter by the testator, and signed by her. It was a receipt for the specified sum "being an advance by him (testator) of one thousand dollars and interest on same. . . . . to make me equal with advances then made to his other children." This receipt was in possession of the daughter at the time of the death of testator. The paper signed by A, the agent, was left in the daughter's possession for several years, when it was delivered to testator by the daughter, and was subsequently found among the papers of the agent after his decease. At the time of the delivery of this paper, testator said it was money he had left in trust with A, the agent, to make the daughter equal to the other children. The delivery of the receipt by the daughter to her father, if made at all, was subsequent to the delivery of the paper signed by the agent, to her. When the receipt was returned to her did not appear. A, the agent, opened an account with the daughter as her trustee, but it did not appear that testator knew of the fact. The daughter never made use of the principal and interest of the money and testator himself used it. *Held*, that these facts did not show a declaration of trust or a gift to or in trust for the daughter in the money.

The daughter and her children who were beneficiaries under the will of

testator were duly cited to appear on a settlement of the accounts of the executor, and did not at such time make a claim that there was a trust in their favor impressed upon the funds of the estate. They subsequently claimed that they were not estopped by their not having set up this claim, for the reason that the trust fund formed no part of the estate of testator. *Held*, that the daughter and her child were estopped from claiming that the executor held a trust fund for them.

ACCOUNTING of the executors of William Crise, deceased.

The facts appear in the opinion.

WILLIAM P. SISSON *and* JAMES P. COX, *for petitioners.*

WILLIAM B. WOODIN *and* CHARLES M. BAKER, *for executors.*

THE SURROGATE.—The petitioners, Mary Ann Hillman and Eddie C. Hillman, filed a petition April 23, 1889, in this court, asking that the executors, Henry G. Crise and D. Pulaski Mersereau be required to appear and render an account, and pay the petitioners certain moneys alleged to have been held by said decedent, William Crise, at the time of his decease, as trustee for the benefit of the petitioners.

William Crise died December 9, 1881, leaving a last will and testament, which was admitted to probate by the Surrogate of this county, on the 31st day of January, 1882, upon which day letters testamentary were issued to said executors. An inventory of the personal property of the decedent was filed March 30, 1882. The amount of the personalty, as shown by the inventory, was $17,105.87.

By his will, the testator gave all his property to his executors, in trust, to convert into cash as soon after his decease, as they may deem best for the interest of his estate, and to divide the same equally among his

children, except the said Mary Ann Hillman, and to retain in their hands one sixth part of said estate, and invest the same safely at interest, and pay over the income thereof to said Mary Ann Hillman for the support of herself and family during her lifetime, and, at her death, to pay over the principal sum and any balance of interest to the children of said daughter then living and the descendants of deceased children. The executors were authorized to purchase for the use of said daughter a house and lot out of said share, to be used by her during her life and to pass to her children in fee upon her decease. The testator was at the time of his death the owner of a farm of 210 acres of land.

The testator, within a few years before his death, gave to each of his children, except Mrs. Hillman, the sum of one thousand dollars. On the first day of April, 1872, the testator delivered to one E. W. Arms of Aurora, who had acted as agent for him in making loans of money, etc., the sum of one thousand two hundred and ten dollars, and took from him a receipt in the following words:

"$1210.—I have in my possession twelve hundred and ten dollars, in trust from William Crise, to invest for the benefit of his daughter Mary Ann Hillman. The interest of which only to be paid to her, when said Crise thinks she needs it, for the support of herself or her child.

"Dated, Aurora, April 1, 1872. E. W. ARMS."

A receipt in the handwriting of said Arms, bearing the same date was presented to Mrs. Hillman by the testator and signed by her. It was produced in evidence, and is as follows:

"$1,212.—Rec'd Aurora, April 1st, 1872, of William Crise, twelve hundred and ten dollars, being an advance by him to me of $1000, and interest on same from April 1st, 1869, to make me equal with advances then made to his other children.

"MARY A. HILLMAN."

This receipt was in the possession of Mrs. Hillman at the time of the death of her father. The paper signed by E. W. Arms, was left in Mrs. Hillman's possession several years, when the testator sent one of his children for it. It was delivered to the testator and was subsequently found among the papers of E. W. Arms after his decease. At the time of the delivery of this paper to Mrs. Hillman, the testator said it was money he had left in trust with E. W. Arms to make her equal with the other children. The delivery of the receipt by Mrs. Hillman to her father appears, if made at all, to have been subsequent to the delivery of the paper to her, signed "E. W. Arms." When the receipt was returned to her does not appear. An account is shown to have been kept by said Arms, with William Crise, and with each of his children. The accounts of three of the children, Sally Ann Watkins, Ann Elizabeth Watkins and Rachel E. Allen, are each opened with a credit as follows:

"1866, April 1; By amt. of William Crise (gift) $1,000." The account of Henry G. Crise contains credit of April 1st, 1866, "By amt. of William Crise, (gift), $1002.92." The account of Charlotte Crise contains a credit of the same date of $472.76 by cash left by William Crise and theretofore invested. It also shows the purchase of a piano for her at $372, and

other credits in 1867 and 1868, making altogether about the same amount. The account kept by Mr. Arms with Mary Ann Hillman was opened April 1, 1872, with the credit:

"By amt. from Father, (William Crise,) in trust for you to invest. R. $1210."

On April 1st of each following year appears a credit of interest, and on April 1, 1875, the account appears to have been balanced by a charge as follows:

"Transferred & Cr. William Crise, a–c to bal. $1482.30."

Upon the account kept by Mr. Arms with William Crise, of date April 1, 1875, appeared the entry:

"By amt. Ann Hillman's a–c, set apart for her April 1, 72, $1210. and the int. on same, $1482.30"

The same day a charge appears to have been made in the same account: "To amt. lent on David C. Auble, B. & N. $2357.09." The account also shows that the interest upon this mortgage was subsequently collected by E. W. Arms, and credited to William Crise.

It is shown by the testimony of Mrs. Mersereau, (formerly Charlotte J. Crise), that her father William Crise, had said to her that he had given four of his children (naming them) some money, and that he was going to place some money in Mr. Arms' hands for Mrs. Hillman, to be paid to her, if he (William Crise), saw fit. This was prior to April 1, 1872. Afterwards she heard her father say he should not give it to her.

On or about April 1, 1872, William Crise gave to each of his children, except Mrs. Hillman, an additional $1,000.

The will of William Crise is dated October 19, 1878.

He died on the 19th day of December, 1881. The inventory of the personal property was filed March 30, 1882. A codicil to the will was made and published May 23, 1877, appointing D. P. Mersereau (the testator's son-in-law), an executor of his will, in place of E. W. Arms, then deceased.

On the 29th day of May, 1884, the executors appeared in this court, and filed waivers of citation to the judicial settlement of their accounts from all the children of the decedent, including Mrs. Hillman, and also waivers of Eddie C. Hillman and Lillian C. Hillman. Eddie C. Hillman is the only child now living of the said Mary Ann Hillman, and one of the petitioners in the present proceeding. An account was filed by said executors the same day, and a decree was granted settling the same. Said decree was not entered at the time of the filing of the petition in this proceeding, but it has since been prepared and entered May 28, 1889, as of the 29th of May, 1884. The executors upon said accounting were charged with the sum of $20,270.14, being the amount of the personal property inventoried, together with the increase thereon. They were credited with $1,113.04, paid for debts and expenses of administration, and with the sum of $16,134.25, distributed among legatees, leaving the sum of three thousand, twenty-two dollars and eighty-five cents in their hands as trustees for Mary Ann Hillman, under the provisions of the will. Upon the present proceeding, the executors have filed their account, (May 21, 1889,) showing the receipt by them since the former accounting of $3,263.70, (made up principally of the avails of farm produce,) and credit-

ing themselves with the sum of $8,867.30, paid out for expenses of administration and distributed as income to the parties entitled under the will; also charging themselves with farm stock and produce, held by them as executors jointly with one William J. Ryan. They also report that from the trust moneys above mentioned they purchased a house and lot for the use of Mrs. Hillman, May 29, 1884, the fee thereof to vest in her children, for which they paid $2,800, and that the balance of said trust moneys, viz.: the sum of $822.85, is on hand and invested for the use of the *cestui que trust*. There is still under the control of the executors, who are given the power of sale thereof, a farm of 210 acres, which they are authorized to lease and collect rents, make repairs, pay taxes and insurance, and manage generally as they may deem best for the interest of the estate. A sale is authorized at such time and upon such terms as the executors may deem best, except that it shall not be sold at public sale without the consent of two thirds in interest of the persons entitled to the avails. The avails are to be paid in equal portions to the children of the testator, except the share, one sixth, of Mrs. Hillman is to be retained and invested by the executors, who are to pay the income to her during her life, and, at her death to pay the principal thereof to her children, etc.

It is claimed by the petitioners that William Crise, in depositing the fund of $1,210 with E. W. Arms, on the first day of April, 1872, transferred the beneficial interest therein to his daughter, Mrs. Hillman and her children, and that the paper there signed by Mr

Arms and subsequently delivered by Mr. Crise to Mrs. Hillman is evidence of a declaration of trust in her favor. Assuming that the language of this instrument was adopted by Mr. Crise as expressing his intention, it must be construed to mean as it states, that the interest of the fund alone was to be paid to Mrs. Hillman, and that only when the donor thought she needed it. No direction is made with regard to the principal, except that it was in trust for William Crise. It was to be *invested* for the benefit of his daughter as specified, *i. e.*, that she might have the interest when her father decided she needed it.

I fail to find in this instrument evidence of a declaration of trust, sufficient to pass the ownership of the principal fund. No intention is expressed to have the principal sum at any time turned over to Mrs. Hillman or her children. The donor reserved the right to dictate as to the interest and his subsequent acts showed he believed he had the right to receive the principal.

To create a trust, the acts or words relied upon must be unequivocal, and, while a different interpretation may with equal plausibility, be placed upon the transaction, it would not be proper to draw the inference that a trust was intended which divested the donor of all further ownership of the property. Martin v. Funk, 75 *N. Y.* 134; Young v. Young, 80 *N. Y.* 422; Barry v. Lambert, 98 *N. Y.* 306.

The petitioners further say that the fact that the testator had given $1,000 each to his other children, and had talked of giving Mrs. Hillman the same sum in 1866 or 1867, to make her equal with his other

children, and that subsequent to the deposit with Mr. Arms, the testator delivered to her the paper signed "E. W. Arms," stating that it would some time make her equal with the other children, and that he thereafter took a receipt from Mrs. Hillman for the amount of the deposit, which recited that it was an advance of $1,000, and interest on same from April 14, 1869; all show that it was his intention to create and declare a trust, in favor of Mrs. Hillman, which passed the equitable title to this fund to her. The entries in Mrs. Arms' book of accounts are also referred to as confirmatory of this theory, but there is no proof to indicate that Mr. Crise either dictated these entries or that he knew what they were.

The objection to the theory of the petitioners is that the two written instruments bearing date of April 1, 1872, but delivered at different times, indicate quite different purposes on the part of William Crise. One shows an intention to invest the fund and use the income for the benefit of Mrs. Hillman, as the donor might direct. The other relates to an absolute gift.

These purposes do not appear to have been concurrent, and there is no evidence of any delivery to Mrs. Hillman, or to any one acting for her.

The subsequent surrender of the paper signed by Mr. Arms, the return by her father of the receipt signed by Mrs. Hillman, and the withdrawal of the fund from Mr. Arms' hands, show that the parties then understood that Mr. Crise continued to have control over the property,—that it was still in fact in his possession. The only delivery had been to the agent of

Mr. Crise, who continued to act under his instructions. Neither the principal nor the interest was ever at the disposal of Mrs. Hillman.

The evidence all leads to the conclusion that the testator intended to give his daughter the interest when he was satisfied she needed it for her support, and to give her the principal at some future time, but that he failed to make such delivery as to constitute a completed gift. The evidence does not establish such a declaration or trust as would transfer the title to the property.

I also think the petitioners are estopped by the proceedings upon the accounting had May 29th, 1884, from setting up the claim that the testator held the fund in question at the time of his death in trust for them or either of them. The petitioners were both parties to that proceeding. They both executed waivers of citation thereto, in which the proceeding is mentioned as the final judicial settlement of the accounts of Henry C. Crise and David P. Mersereau, executors, etc., of William Crise, deceased. The account then presented purported to include all the property belonging to the estate of the deceased, which had come to the possession of the executors or been received by any other person for their use, except the real estate. The latter did not in any manner represent the fund in question. The rights of the parties then and now before the court, as to the property in dispute, were involved in the distribution theretofore made, and which was in fact adjudged by the court to have been properly made. That the petitioner Mrs. Mary Ann Hillman, who now claims that a trust had

been declared in her favor, knew at the time that the rights of the parties as to this property, were being adjudicated, is shown by the fact that, upon the 3d day of April, 1883, when the executors paid the other children their distributive shares of the personal property, three of them gave Mrs. Hillman $333.33 each, because she had not received as much as the others, that being one sixth of the amount considered necessary to make her equal, and had the other two children given the same amount each, Mrs. Hillman would have been made equal as to the principal. The account stated the amount of the balance at $3,822.33, which sum was held by the executors in trust for Mary Ann Hillman, in accordance with the will of said deceased. No objections were made to the account, and a decree was directed to be entered settling the same.

There was therefore a judgment of a court having jurisdiction of the parties and subject matter, upon an issue involved in the proceeding, and the same was conclusive and must be so held in this proceeding. Davis v. Tallcot, 12 *N. Y.* 184; Blair v. Bartlett, 73 *N. Y.* 150.

An application has been made, pending this proceeding, to open the decree settling the account filed in May, 1884, but, so far as the question now under consideration is involved, I understand the application to have been abandoned, the attorneys for the executors consenting that, so far as any errors are concerned, which appear upon the face of the account, such as mistakes in figures, they may be corrected upon this hearing. However, were the application for opening

the decree and a new trial of the question relating to the ownership of the alleged trust fund, properly before the court, I do not think the facts would justify the court in opening the decree.

It is further submitted by the petitioners that the former decree did not adjudicate upon this trust, for the reason that the trust fund found no part of the estate of William Crise. The answer to this proposition is, that the fund in question appears to have been mingled with the assets of the decedent, and by his death the claimants lost any vested rights they might have had as owners of the property, and were remitted to the standing of mere creditors of the estate of William Crise. (Matter of O'Brien, 45 *Hun* 284.) Being parties to the former accounting, they ought to have asserted their claim at that time.

The account now presented will be settled, with such corrections as may be agreed upon or hereafter directed.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—September, 1889.

IN THE MATTER OF FREY.

In the matter of the probate of the will of JOSEPH B. FREY, *deceased.*

Where a will is, on its face, properly executed and attested, and one of the witnesses thereto testifies that she was not asked to sign the will as witness, the will should notwithstanding be admitted to probate,

where the recollection of the witness is evidently defective or perverse, and where the other subscribing witness who had drawn the will, and also a third person present at the time of the execution, both testify that such witness was, in fact, requested to sign by testator.

Where decedent willed one fourth part of his residuary estate to his executor "to be devoted by him to and for a certain purpose made known unto said executor by a certain letter dated," etc., "written by me to my said executor, and bearing," a specified date "said letter to form a part of this my will," and no such letter has been found, it must be held that the decedent died intestate, as to that part of his estate.

Further held, that the non-production of the letter does not invalidate the will as to the other three fourths of the residuary estate.

PROBATE of the will of Joseph B. Frey, deceased.

GEORGE W. CARR, *for proponent.*

EDWARD B. CROWELL, *for contestant.*

THE SURROGATE.—The instrument, though without date, appears by the testimony to have been executed on the 17th day of April, 1882, the date of a letter referred to in the body of the paper. The subscribing witnesses were Charles N. Hilliard, the attorney who drew the will and superintended its execution, and Mrs. Clemence Dodge. During the seven years that succeed the event the memory of Mrs Dodge as to the occurrence had become nearly obliterated, unless her testimony was given in a disingenuous spirit —which, from a careful reading of it, seems not improbable. When the attention of Mr. Hilliard was first called to the subject, after the testator's decease, he said that his recollection was vague as to the circumstances attending the transaction, but, on reflection, he was able to recall the facts. If his testimony is to be credited, the requirements of the statute were substantially complied with. His statements in that

regard are corroborated by the proponent, Mr. Clirehugh, whose wife was a sister of the decedent and is a legatee named in the will.

The decedent's widow, by her attorney, contested the probate of the paper, alleging that it was not the decedent's free and unconstrained act, and that it was not executed, in conformity to the statute.

Mr. Hilliard states that two days before the paper was executed Mr. Clirehugh gave him some headings of the proposed will, of which he took memoranda. On the day on which it was drawn he proceeded to an apartment in the residence of the decedent, whom he had never until then seen, and the provisions of the instrument were discussed by the decedent and Clirehugh, and he then drew the will. After its completion Mrs. Dodge, who was in the apartment of Mrs. Frey, and who was to remain with her during the night, because the decedent was to leave for Washington, was asked by him to come into the room where the instrument had been prepared, he stating that she was wanted to witness a paper for the disposition of his patents, and that he did not say that it was his will. In this statement she is confirmed by the testimony of the contestant. She, however, did not accompany Mrs. Dodge into the other room. When there Mrs. Dodge states that no one asked her to sign her name as a witness to a will. Her memory is singularly perverse in respect to nearly all the circumstances attending the execution, and the greater part of her testimony is a succession of answers, "I cannot remember," to the questions propounded in re-

spect to the successive acts to constitute the valid execution of the will.

Mr. Hilliard in 1882 had been admitted to the bar for three years, and he states that during that period he had drawn six wills. He further testifies that on this occasion, before proceeding to the decedent's residence to draw the paper, he took the precaution to look at the statute in respect to its requirements. At the foot of the instrument is an attestation clause in his handwriting, and both Hilliard and Clirehugh say it was read at the time of the execution in the presence of both witnesses. It is incredible that a lawyer of any experience in superintending the execution of wills, unless he was a party to a fraud, should have written the recitals contained in the clause, and then signed them, if the events therein stated had not taken place; and as he testifies that his feelings are not cordial toward the proponent, Clirehugh, because he had refused to pay him for his services in connection with the matter, I certainly see no reason to believe that he would vary his statements from the truth, nor does the fact that Clirehugh and Hilliard do not agree in respect to some of the important details of an interview cause me to doubt that the will was properly executed.

Under a well settled principle of law, if, by reason of the lapse of time, witnesses are not able to recall the circumstances connected with the execution of a testamentary instrument to which they have affixed their signatures, the existence of an attestation clause reciting the facts requisite for a due execution, and to which the witnesses have affixed their signatures,

comes in aid of probate; and in this case, as its statements are reinforced by the positive recollections of Mr. Hilliard and Mr. Clirehugh, I am satisfied that the will was properly executed.

The contestant calls in question the construction and legal effect of the disposition of the personal estate of the decedent upon a further ground. By the will the decedent bequeaths to his wife one third of the profits accruing from certain royalties on patents and one third of the proceeds of the sale and manufacture of a certain other patent to be issued to him, and gives the residue of his estate to be divided into four equal parts, one to his mother, another to his sister, Mrs. Clirehugh, another to his brother, August William, and the fourth part "unto my executor, to be devoted by him to and for a certain purpose made known unto said executor by a certain letter written by me to my said executor, and bearing date April 17, 1882, the said letter to form a part of this my will." No such letter was found after the decedent's death. Mr. Hilliard states that he was informed by the decedent and by Clirehugh, at the time of drafting the will, that the letter was then in existence. In this respect the recollection of Mr. Clirehugh is different. If it had been written at the time and was properly identified, its directions would be followed as a part of the instrument; but as it was not found, and I hold that the paper propounded was properly proven as the decedent's will, the non-production of the letter cannot invalidate the provisions for the disposition of three of the four parts of the residuary estate, and that the fourth part must go to the parties in interest under the Statute of Distributions.

WESTCHESTER COUNTY—HON. OWEN T. COFFIN, SURROGATE.—October, 1889.

MATTER OF FISHER.

In the matter of the judicial settlement of the account of GEORGE H. MEAD, *as executor of the will of* REBECCA J. FISHER, *deceased.*

A bequest to an executor to expend the sum of two hundred dollars "as my executors may deem best, within the time prescribed by the statute, governing perpetuities, in keeping my burial plot in good condition," is void under the Revised Statutes (1 *R. S.*, p. 773, § 1,) which authorizes certain limitations based on life or lives, but not at all upon time.

Such bequest is also void, because there is no person, beneficially or otherwise interested who could compel an employment of the fund as testatrix intended.

The gift of the residue for life, will entitle the residuary legatee to such interest as may have accrued up to the end of the year after testator's death, and then, interest on the amount of the fund as afterwards ascertained, from that first year.

ACCOUNTING of George H. Mead, executor of the will of Rebecca J. Fisher, deceased.

The testatrix died March 15, 1887, and letters testamentary were issued to the executor October 10, 1887. Among other things the testatrix, by the first clause of her will, provided as follows: "After all my just debts and funeral expenses are paid, I order and direct my executors, hereinafter named, to expend the sum of two hundred dollars, as my executors may deem best, within the time prescribed by the statute governing perpetuities, in keeping my burial plot in White Plains Cemetery in good condition." Then,

among other bequests, she gave to her sister, Matilda C. Harrington, her clothes and five hundred dollars in money. After the sum of $200, directed to be expended by the first clause, and the payment of the other legacies, she directed that the residue of her estate be invested by the executors on bond and mortgage, the interest and income thereof to be paid to her said sister during her natural life, with remainder over.

W. STEBBINS SMITH, *for executor.*

F. W. SHERMAN, *for* MATILDA C. HARRINGTON.

THE SURROGATE.—On the part of Mrs. Harrington, two objections, among some minor ones, are presented for solution. The first is, that the provision of the will directing the executors to expend two hundred dollars in keeping the burial plot of the deceased in order, is void, because in conflict with the statute against perpetuities; and the second is, that the executor has not paid and resists payment to the residuary legatee for life, of the earnings of the fund.

It may be regarded as somewhat remarkable that no adjudicated case, in this state, can be found, which determines the point covered by the first objection, although a similar provision is made in many wills which have come under my observation. Doubtless the reason why a similar objection has not been made in such cases, was a delicate regard for the wishes of the deceased in that respect. Whatever the cause, as the question is now raised, it must be determined. Our statute forbids a disposition of property in such

a mode as will suspend the absolute ownership of it perpetually, but allows such suspension during not more than two lives in being at the death of the testator. Now, although no trust, in terms, is conferred upon the executor, yet that is the effect of the provision, and was the intention of the testatrix. A trust may be created without using the word "trust" or "trustee," and so the word or words may be used, and yet no trust be created. Here the sum was to be used for the purpose indicated as the executors might deem best, "within the time prescribed by the statute governing perpetuities." What the testatrix meant by this last phrase, it is difficult to understand, as our statute (1 *R. S.* 773, § 1) authorizes certain limitations based upon life or lives, and not at all upon time. There is, therefore, no valid limitation whatever to the trust in question. The executor, if he were dishonest, might retain the fund, so set apart, indefinitely, and not expend a cent of it for the designed purpose, and has, in fact, only expended enough to paint the fence around the plot, not exceeding ten dollars, which is not equal to the interest on the fund for one year. While the point does not appear to have been determined by our courts, yet the question has been settled in other states and countries, where such a provision is held to be in violation of the statute, which appears to be nearly universal. McLeod v. Dell, 9 *Fla.* 427; Rickard v. Robson, 31 *Beav.* 244; Fowler v. Fowler, 10 *Jur.* (*N. S.*) 648. It is also void because a dishonest executor could take to his own use the entire fund, without question. There is no person beneficially or otherwise interested who could

compel an employment of the fund, as the testatrix intended. Holland v. Alcock, 108 *N. Y.* 312, and cases cited.

As to the second point, it seems to be well settled that the gift of the residue for life, will entitle the residuary legatee to such interest as may have accrued up to the end of the year after letters were granted, and then interest on the amount of the fund, as afterwards ascertained, from that first year. 2 *Redf. on Wills*, 472; Dimes v. Scott, 4 *Russ.* 195; Lovering v. Minot, 9 *Cush.* 151, 156; Williamson v. Williamson, 6 *Paige* 298.

It follows, then, that the $200 to keep the burial plot in good condition, being undisposed of, in a legal sense, will fall into the residuum, and that Mrs. Harrington is entitled to interest, as above stated.

The other objections are overruled.

KINGS COUNTY.—HON. GEO. B. ABBOTT, SURROGATE.—October, 1889.

MATTER OF GILMAN.

In the matter of the judicial settlement of the account of AARON HEALY, *as executor and trustee of the last will of* NATHANIEL GILMAN, *deceased.*

A legatee duly cited, who has filed no objections to an executor's account, is not entitled to cross-examine the executor in relation thereto.

MATTER OF GILMAN.

MOTION to confirm the report of a referee upon the accounting of Aaron Healy, executor and trustee of the will of Nathaniel Gilman, deceased.

FLAMEN B. CANDLER, *for* AARON HEALY, *executor.*

CHARLES T. HAVILAND, *for* CHARLES B. GILMAN.

WILLIAM H. HAMILTON, *for* CHARLES B. CALDWELL *and* JACKSON S. SCHULTZ, *assignees of* ANNA K. GILMAN.

ANNA K. GILMAN, *in person.*

WELLESLEY W. GAGE, *in person.*

THE SURROGATE.—Charlotte Elizabeth Gilman died on the 10th day of October, 1879, without issue, not having reached the age of thirty years. She was the last surviving child of the testator, Nathaniel Gilman, Jr. This was one of the events upon the happening of which, by the terms of the will of the testator, his property was to be distributed. On the 23d day of June, 1880, Aaron Healy, the executor and trustee under the will, filed his account. All the persons interested in the estate were duly cited. Objections to this account and to previous accounts of the executor and trustee were filed by Anna K. Gilman, a sister of the testator. No other persons filed any objections. The accounts and the issues raised by the objections of Anna K. Gilman were referred, November 30, 1885, to Cornelius Ferguson, Jr., to take testimony as to the said issues, and to hear and determine all claims, questions and other matters relating to said accounts. On the 25th of October, 1887, the referee filed his report. Exceptions to said report were filed by

Charles T. Haviland, on behalf of Charles B. Gilman, and by Anna K. Gilman, attorney in person.

The questions before me arise on the exceptions aforesaid and upon the confirmation of the referee's report. The voluminous objections of the contestant, Anna K. Gilman, have been passed upon clearly and cogently by the referee, and after carefully examining all the accounts of the executor and trustee made in this estate, and the evidence taken in this proceeding, I am of the opinion that the evidence fully supports the findings of the referee, and that his report should in all respects be confirmed. The executor has managed the affairs of the estate with prudence and thrift, and all the legatees, some fifteen in number, except these two contestants, have acquiesced in and are satisfied with said executor's accounts, and have given him releases and discharges in full settlement of their shares of said estate.

As to the contention made in behalf of Charles B. Gilman, that the referee erred in refusing to allow him or his counsel to cross-examine the executor in the proceedings before the referee, he not having filed any objections to said executor's account, I am of the opinion that the ruling of the referee was correct.

Charles B. Gilman was duly cited upon this accounting and so made a party to the proceeding. He never filed any objections to the account, and, so far as he is concerned, there is no issue between him and the accounting executor. "The filing of a duly verified account by an executor entitles the accounting executor to a decree confirming its accuracy in the absence

of objections to the account." Estate of Austin, 3 *Law Bull.* 78.

The referee in this proceeding was appointed to try the issues raised by the objections filed to the account. The only objections filed were those of Anna K. Gilman, and she was the only person entitled legally to examine the executor. The executor had an absolute right to a decree settling his accounts, so far as Charles B. Gilman is concerned. He should have filed objections if he desired to take any part in the contest. I think sections 2730 and 2731 of the Code have practically the same meaning, and are to be construed in the same manner as the sections of the Revised Statutes which they have replaced. Such being the case, Boughton v. Flint, 74 *N. Y.* 476, decides this contention. The account was bitterly opposed in almost every detail by the contestant, Anna K. Gilman, and her numerous counsel, for a period of nearly two years, and in my opinion everything which could by any possibility be brought out against the account was brought out by this contestant and her counsel. I think that the whole matter has been gone over fully and thoroughly before the referee.

CATTARAUGUS COUNTY.—HON. ALFRED SPRING, SURROGATE.—October, 1889.

MATTER OF BABCOCK.

In the matter of the judicial settlement of the account of ALBERT G. DOW *and* M. V. BENSON, *as executors of the will of* JOHN A. BABCOCK, *deceased.*

Real estate of the testator subject to a mortgage held by one of the executors was sold, with the agreement that the purchaser thereof should assume the mortgage. The whole purchase money, however, was paid to the executors, and was retained by them uninvested. *Held*, upon the executor's accounting that the mortgage should be treated as if paid to the time of the sale, and that the estate should not pay interest thereon after such time.

One of the executors held a note of testator for interest then overdue on a mortgage. The executor, without having this debt proved to or allowed by the Surrogate, as required by statute, 2 *R. S.* 88 (8th ed., p. 2561), § 33, paid this note out of the funds of the estate, which, as it afterwards appeared, were insufficient to pay all the debts. *Held*, that he had no right to do this, and *Further held*, that having treated the note as payment of the interest, he could not afterwards ignore the note, and claim that it was merely evidence of the debt, and that the interest was therefore still due by the estate.

An executor of an estate who has deposited funds belonging thereto in a bank of which he was president and principal stockholder, and which funds have remained in said bank without drawing interest for over a year, will be charged with interest thereon at the rate paid by that bank on time deposits.

ACCOUNTING of Albert G. Dow and M. V. Benson, executors of the will of John A. Babcock, deceased.

M. V. BENSON, *executor in person.*

J. G. JOHNSON, *for executor*, DOW.

CROWLEY & REILLY, *for contestants.*

THE SURROGATE.—Although this controversy has jingled along for two years, and the papers in the

case are voluminous, yet the real difference between the parties is slight.

I append a summary statement of the account as I regard it established.

The executor sold the home farm of testator for $5,632, April 22, 1886, but the money therefor was not paid until the 19th of the succeeding month, so that the executors received in interest $23.76. By the terms of the contract of sale the purchaser was to assume the payment of the mortgage held by the executor, Mr. Dow, and which was an incumbrance on this farm, but it seems that the entire purchase money was paid to the executors. The Dow mortgage should then have been paid. It was not fair to the *cestuis que trustent* to retain this money uninvested and permit his mortgage to be earning interest from the estate, and I have accordingly treated the bond and mortgage as paid May 19, 1886, which is in accordance with the agreement made with the purchasers of this land.

The interest on the mortgage had not been kept up by the testator, and Mr. Dow had at one time a settlement with him and took his note of $381.36 in payment of this interest, as Mr. Dow testifies. This note Mr. Dow paid out of the funds of the estate.

He had no right to do this until it had been judicially settled; *Rev. Stat.*, part 2, chap. 7, art. 2, sec. 33 (page 2561, 8th ed.); *Code Civ. Proc.*, sec. 2739; Neilley v. Neilley, 89 *N. Y.* 352; Snyder v. Snyder, 96 *N. Y.* 88.

If there had been sufficient funds to pay the debts of the deceased, this would have been only a technical

error, but it seems the property will be insufficient to pay the claims against testator, and his course gives his own claim a preference over others of the same class. His counsel urges that this was a mere evidence of the debt and the whole amount of interest still attached to the mortgage lien. He treated the note as a payment of this interest. This enabled him to get compound interest, and in paying it he made his computation with full recognition of the note as an obligation. It is too late after it becomes apparent the estate will not pay in full to ignore the note which he cheerfully enough fathered and recognized and even paid, and now embodies in his account as a liquidated obligation.

The money received by Mr. Dow as executor, and it was considerable in amount, he deposited in the Salamanca National Bank of which he was president and until recently the owner of a major part of its capital stock. He accounts for no interest on this large sum upon the pretext that he must hold it in readiness for his judicial settlement. This money arising from the sale was paid over in May, 1886, and the auction sale was before this, so that the greater portion of the moneys was in the custody of the executors as early as the date of the actual sale of the home farm, and proceedings to settle the accounts of the executors were not instituted till November, 1887, and during all this time the money was lying idle. Thrifty, careful business men cannot be excused for being so derelict in the management of trust funds committed to them.

The cashier of the bank testifies that it was the custom of the bank to pay three per cent on time de-

posits and even more than this upon a special agreement. The president and principal stockholders of the bank were fully aware of this and justice required that he should have these moneys earning something to the estate, not to him and the other stockholders.

The theory of the law is that an administrator should make no personal profit out of the estate intrusted to him. These moneys were a source of daily revenue to Mr. Dow. They formed a part of the discounts, comprised a portion of the material out of which the banking business was made profitable and was sustained as a business venture. Certainly three per cent is a low rate to charge against him, but the proof fails to elicit the measure of his profit. Probably it cannot be ascertained with accuracy. It is urged in his behalf that after proceedings for judicial settlement had been commenced he was obliged to have this money in readiness for distribution.

If he had taken an interest certificate, that would have been in his possession at the commencement of this proceeding and he could have held it intact until distribution was ordered. I have only charged interest even at this small rate on the net sum remaining after his partial distribution, so that the whole sum upon which interest has been computed has been continuously in his possession.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN SURROGATE.—November, 1889.

MATTER OF SOMERVILLE.

In the matter of the judicial settlement of JOHN EDWARDS, *as executor of the will of* HELEN E. SOMERVILLE.

Where services have been rendered and board furnished to one since deceased, upon his promise to compensate the person rendering and furnishing the same therefor, if the will of the promisor contains a legacy to the promisee sufficient to cover only a part of his claim, the legatee can recover the balance due; but where the testamentary provision to the promisee equals or exceeds the just amount of it, the claim is extinguished.

Testator during his last illness, gave his son some keys and told him that everything was to be his. The son claimed that this was a gift of the household goods of the deceased, and that the keys given to him were those which gave access thereto.—*Held*, that this was not a present gift, but had reference to the future, and that there being no evidence of the identity of the keys it would not be assumed that they were those giving access to the household goods of deceased.

THE testatrix was a widow, and, as it appears, without children, and the executor was her brother. By her will, which was made in 1886, after the bequest of some trifling legacies, she devised a life estate in her real estate, which consisted of a house and lot in the city of Yonkers, to her brother, and bequeathed the use of her personal estate to him for life, with remainder, in both, over. The executor, during her lifetime furnished her board for a period, and rendered her certain services, with, as is alleged, an understanding that the property of the deceased was to be his at her

death. He rendered his account as such executor; and omitted to charge himself with the household furniture owned by the deceased, and also claimed, as creditor, the sum of $1,460 for her board and services rendered to her.

Objections were made accordingly.

W. M. SKINNER, *for executor.*

JOHN C. SMALL, *for* JOHN W. EDWARDS, *a residuary beneficiary.*

GABRIL REEVE, *for* WM. K. DAVISON *and* LIZZIE EDWARDS, *residuary beneficiaries.*

THE SURROGATE.—The executor claims, and has endeavored to show, that it was understood between himself and the deceased, that he was to be compensated for the board furnished and the services rendered by him, not by a mere provision in the will of the testatrix, but by the entire devise and bequest of all of her property; and that her household furniture and other movables in her house were actually given to him by her in her lifetime; that he has not, by her will, received the promised compensation, and hence seeks to recover his claim out of the estate. There is no direct evidence as to the value of the house and lot, but it is stated to rent for $250 per annum. It is admitted that the value of the personal estate, was about $2,300 exclusive of furniture, etc. The petition to prove the will represents the whole value of the estate as not exceeding $7,000. The approximate value of the real estate, then, may be assumed to be about $4,700. In reference to the mode and measure of compensation Sarah E. Edwards, a daughter of the executor, testifies that on one occasion the

deceased said to the executor that she would give him everything after she was through with it, and on another occasion, that there was no necessity for his furnishing a bill for his services in planning the house she built; that he should have it when she was through with it; she would leave everything to him. The house was built in 1884; the will was made in 1886. There is no proof as to the time when these two declarations were made, except that it may be inferred that the one relating to a bill for the plans of the house, occurred after these plans were prepared by the executor, the claim presented by him embracing a charge for those plans, and the will was made subsequently, in and by which she did leave everything to him, for life instead of absolutely. Considering the facts that the witness gives what purports to be a declaration made by the deceased; that she is a daughter of the executor, testifying in his behalf; and the possibility of a mistake by her in detailing the language used, in connection with the fact that the will, made not long thereafter, does give everything to him for life, the strong probability is that in so doing, she did what she had previously expressed an intention to do. The testimony of the witness Ruxton, if admissible, does not materially alter this view. There can be no doubt that the provisions of the will, in that respect, were intended as a compensation to her brother for all he had done for her in the way of board furnished and services rendered. The rule is that, where such an understanding exists between the parties, if she had failed wholly to make such a provision, then the executor would have been

left to enforce the whole amount of his claim; that if the provision were sufficient to cover a part only of the claim, he could recover the balance; but where it equals or exceeds the just amount of it, the claim is extinguished. Jacobson v. La Grange, 3 *Johns.* 199; Eaton v. Benton, 2 *Hill* 578; Robinson v. Raynor, 28 *N. Y.* 494; Reynolds v. Robinson, 64 *N. Y.* 589; McRae v. McRae, 3 *Bradf.* 199. Even if it were true that the testatrix had promised, in consideration of the board furnished and services rendered, to give the whole estate to her brother absolutely, and has failed to do so, his measure of compensation would not be the value of the whole estate, but what he could show they were worth. And so now, in this case, he can recover nothing, if the provision made for him is equal in value to the amount of his claim.

In the view taken, it is deemed unnecessary to determine what is the just amount of the claim presented, although it is open to criticism, for the reason that the provisions of the will seem to make adequate compensation for all that is claimed. It was stated that the house and lot rented for $250 per annum, and the annual interest on the personal estate estimated at $2,000, at five per cent, would be $100. The testatrix died in May, 1888, and the life beneficiary has thus enjoyed the use of the property for a year and a half. Deducting for taxes, etc., it is estimated he has already received about $400. There is no evidence as to his age, but assuming it to have been seventy at the time of the death of the testatrix, the gross value of his life estate in the property, stated to be worth $7,000, would be upwards of

$2,000. This, of course, exceeds the amount he claims, and deprives him of any right of recovery.

The claim that the houshold furniture, etc., was given to the executor by the deceased cannot be sustained. The evidence does not indicate a present gift—a divesting herself of the title and conferring it upon him. Catherine Williams, who was the nurse employed during the last illness, saw deceased take some keys from under her pillow, and heard her say "take those keys." He took them and "unlocked a closet off of the room and I think he unlocked a trunk or something, and at one time, I think, took out papers, or a box, or something." Surely, this of itself is altogether insufficient evidence of the gift of anything. Other evidence was given by the executor's daughter, Sarah E. Edwards, in regard to the delivery of the keys. She says "she gave him the keys and told him that everything *was to be his.*" This proves no present gift, but rather has reference to the future. Beside, there is no evidence as to what keys they were of which the last witness speaks. We cannot, in the absence of proof, assume that they were keys, the possession of which gave access to the household goods of the deceased. The testimony in regard to the value of the personal effects, so claimed to have been given, is conflicting—ranging from $100, as stated by the executor, to $475 as estimated by his son, a contestant. It may be fairly fixed at $200, and must be accounted for accordingly.

Other objections to the account are overruled. As the executor has failed in his contention, he can be allowed costs out of the estate only, as in case of no

contest. The contestants are allowed their costs out of the estate, to be taxed.

MONROE COUNTY.—HON. JOSEPH ADLINGTON, SURROGATE.—November, 1889.

MATTER OF MILLARD.

In the matter of the judicial settlement of the account of HENRY MILLARD, *as executor of the estate of* SYLVANUS S. MILLARD.

Where an executor receives as part of the assets of testator a note then due, made by a solvent person resident in another state, and who is then the owner of a farm of a value much greater than the amount of the note, the executor is liable for the amount of such note, where instead of endeavoring to collect the same, he waits until other liens have matured against the farm, and it has been sold on execution, and he then takes a new note for the amount of the debt, which turns out to be worthless, by reason of the then insolvency of the maker.

The testator bequeathed to his wife, absolutely, his household furniture, and in another clause of the will bequeathed and devised to her "all the residue and remainder of my real and personal estate, to be used for her personal benefit during her natural life." By the same clause the executor was authorized, with the advice and consent of the wife, to sell any part or all the real and personal estate of testator, the use of the money arising therefrom to be given to the wife for her benefit and support during her natural life. After her death, certain legacies were given to testator's daughters, the remainder of the estate to be divided among all his heirs. The payment of the legacies after the widow's death would nearly exhaust the whole of the residuary estate. *Held*, that the widow was entitled only to the use or income of the residuary estate during life, and that it was the duty of the executor to preserve the principal for distribution to the legatees after the widow's death.

The executor with the advice and consent of the wife, under the clause of

the will cited, sold part of the real estate of testator, and paid the proceeds thereof partly to the wife, and partly to himself on account of a legacy given to him by the first paragraph of the will.

Held, that he must account for the sums so paid by him.

ACCOUNTING of Henry Millard, as executor of the will of Sylvanus S. Millard, deceased.

The facts appear in the opinion.

J. H. CHADSEY, *for executor.*

HORACE MAGUIRE, *for contestant.*

THE SURROGATE.—The will of the above named decedent after directing the payment of his debts, bequeaths absolutely to the testator's wife all of his household furniture. It then gives to his son Henry, the executor, a bequest of $1,000, and proceeds as follows, viz.:

"Fourth. I will and bequeath to my beloved wife, Margery Millard, all the residue and remainder of my real and personal estate, to be used for her own personal benefit during her natural life. I hereby authorize my executor, hereinafter named, with the advice and consent of my wife Margery to sell in part or all of my real and personal estate, and the use of the money arising therefrom shall be, as above stated, given to my wife Margery, for her benefit, and support during her natural life, and after her decease, I will my daughters, Barbery S. Rich, Jennett Ann Clark, Freelove A. Everett, and Alexander S. Millard, each one, five hundred dollars. The remainder of my estate to be equally divided among all of my heirs."

The will is dated December 15, 1873, and the testator died June 27, 1876.

The account of the executor states that the testator's estate consisted of a house and lot worth $1,200, a small farm, worth $1,500, and a mortgage and certain promissory notes, having an apparent value of about $2,700. Of these notes several were reported worthless, among the number being one made by Barzilla Millard, a son of the testator. There was realized from the personal assets somewhat more than $1,400, out of which were paid the debts of the testator, amounting to about $465, and the remainder was turned over to the widow by the executor. In 1881 the farm was sold for $1,500, of which the executor retained $700 to apply on his own legacy above mentioned, and paid over the remaining $800 to the widow. The latter died in August, 1885, leaving no property.

Objections were filed to the account, the matter was referred, and the questions now to be considered come up on exceptions to the referee's report.

The referee found in effect that the indebtedness of Barzilla Millard to the estate heretofore mentioned was not collectible, and that the account of the executor should not be surcharged with the amount thereof. This, I think, was error. It appears from the evidence that Barzilla had given to his father, in 1875, his promissory note for $387.32, payable on demand, and that this note came into the executor's hands in the fall of 1876, as a part of the testator's assets.

Barzilla, at that time, owned a farm in Maryland, worth from $3,000 to $4,000, which was incumbered to an amount not exceeding $1,200. The executor visited Barzilla in Maryland soon after he had

received letters testamentary, and had come into possession of the note aforesaid. A judgment on the note could then have been easily obtained, either by confession or action, and such judgment would have insured the ultimate collection of the debt, by making it a lien on the farm. A mortgage would have made the claim equally secure, and could probably have been obtained.

The executor, however, did nothing. Barzilla contracted other debts. Judgments were taken against him, and at last in 1879 the farm was sold on execution, was bought in by the executor individually, and was afterwards mortgaged by him for $1,850, and a large part of the money so obtained was used in paying off claims against Barzilla.

On the same day that the executor became the purchaser of Barzilla's farm, he surrendered the note of 1875, and took the one which he now holds for $519, in renewal of the former. The new note is signed by Barzilla alone, and is worthless. This debt seems to have been lost through the negligence of the executor, and he should be charged with the value thereof.

An executor is bound to try to collect a debt due from a solvent person in another state and when such debt is lost by his neglect, he is liable. Shultz v. Pulver, 3 *Paige*, 182; affirmed 11 *Wend.* 361; see also Harrington v. Keteltas, 92 *N. Y.* 40; Hollister v. Burritt, 14 *Hun* 291–293; Holcomb v. Executors of Holcomb, 11 *N. J. Eq.* 281–300; Powell v. Evans, 5 *Ves.* 839–844.

A second question arises in regard to the turning over to the widow by the executor, of the entire per-

sonal estate after payment of debts; and also in regard to the payment to her of the sum realized from the sale of the farm, less the $700, applied on the executor's own legacy.

The decision of this point depends wholly on the construction of the fourth clause of the decedent's will above quoted.

The executor maintains that by virtue of that clause, the widow took an absolute title to the testator's property, and had a right to its possession and to use the whole for her benefit and support. This is the view taken by the referee.

The contestant, on the contrary, insists that the widow was entitled only to the use or income of the residuary estate during life, and that it was the duty of the executor to preserve the principal for distribution to the legatees after the widow's death.

I think that the latter is the correct construction of the instrument. The testator, in the first clause of the will, had given his wife all his household furniture absolutely. In the fourth clause he evidently intended to make a different disposition of the residue, and to give her the use only of that portion of his estate remaining after payment of debts and of the executor's legacies.

That he did not intend to give her power to exhaust the principal seems plain from the fact that nearly the whole of such principal would be required to satisfy the legacies directed to be paid therefrom after the widow's death.

It is also to be observed that the power to sell either the personal or real property was lodged, not in the

widow but in the executor. No part of the personal property should have been turned over to the widow except the household furniture.

By the third clause of the will, an absolute legacy of $1,000 was given to the executor, Henry Millard. That legacy was payable in one year after the issue of letters testamentary, out of the personal estate. The satisfaction of this legacy, the payment of testator's debts, and of funeral expenses and of the executor's commissions and expenses would have just about exhausted the collectible personal assets, and, if the executor had followed the plain rules of the law in the premises, no question could have arisen in regard to the ownership or disposition of such personal assets.

So long as the land remained unsold the only "use" the widow could make of it would be to occupy and work it, or to lease it; and it seems very clear that when a part was sold, she took under the will only the interest or income, of the money realized therefrom. When, therefore, the executor turned over to her a part of the principal derived from such sale, and paid part to himself as legatee, he did that which he was not authorized by law to do, and he must now account for the fund. Calkins v. Calkins, 1 *Redf.* 337; Tyson v. Blake, 22 *N. Y.* 558, Terry v. Wiggins, 47 *Id.* 512, 515; Livingston v. Murray, 68 *Id.* 486; Matter of Cager, 46 *Hun* 657.

This case is clearly distinguishable from those in which the testator gives to a beneficiary during life the use of property for his support or benefit, and then directs that the "residue" or "the remainder" or "what remains" or "what is left" shall be divided

among certain specified persons. Examples of this kind are, Cohen v. Cohen, 4 *Redf.* 48; Spencer v. Strait, 38 *Hun* 228; Thomas v. Wolford, 49 *Hun* 145; Leggett v. Firth, 53 *Hun* 152.

In all these cases it was clearly the intention that the principal fund could or would be encroached on or expended; and that it was only the unexpended remainder which was to be divided after the death of the first beneficiary, while in the present case, the testator has given legacies payable after the widow's death, which, as before said, would require for their payment nearly the whole residuary estate.

For these reasons the report of the referee must be set aside and the order of reference vacated.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE—October, 1889.

MATTER OF MEIKLE.

In the matter of the judicial settlement of the account of AGNES MEIKLE, *executrix, and* JOHN S. GILMORE *and* WILLIAM S. FORD, *executors of the will of* WILLIAM MEIKLE, *deceased.*

Where part of the estate of testator consists of a tenement house, and it appears that a housekeeper and janitor are necessary to care for the property, and that it is customary to allow such housekeeper and janitor to occupy an apartment in the house free of rent, in addition to paying about thirty dollars a month wages, an agreement made by the executors with the widow of testator, who was also executrix, to per-

form the duties of housekeeper and janitor of said building, in consideration of receiving free of rent, the same apartments she occupied before the death of the testator, will not be disturbed.

Testator by his will, bequeathed and devised his residuary estate in trust to his executors, to pay one third of the net income to his wife. The will directed further, "On my eldest child attaining the age of twenty-five years, if my said wife shall not then be living and in case my said wife is living at that time, then upon her death, to sell and convert my said estate into cash, and to pay and divide the proceeds thereof to and among my children, share and share alike, the issue of any deceased child to take the share the parent would have taken, if living. In case my son shall desire to go into business before attaining twenty-five years of age, my executrix and executors may, in their discretion, advance to him, upon his share in my estate, such sum as to them may seem meet and proper." Subsequent to the death of the testator, one of his children, M., who had married during his lifetime, died leaving her surviving a child who thereafter died, leaving as his only heir and next of kin, his father. *Held*, that each child or the issue of a deceased child took, on the testator's death, a vested estate in an undivided one fourth part of his property, descendible on the death of any child to its heirs or next of kin, and that the husband of the deceased daughter, M., was not only entitled as the administrator of his wife, to receive whatever income became due and payable to her before her death, and also to whatever income became due and payable to his son before the latter's death, but that he is entitled to future income, and to share in the residuary estate at the expiration of the trust.

ACCOUNTING of the executrix and executors of the will of William Meikle, deceased.

The facts appear in the opinion.

MACLAY & FORREST, *for executrix and executors.*

FRANCIS W. JUDGE, JR., *for* BELLA MALCOLM, *contestant.*

GEO. W. CARR, *for* THOMAS A. MCEWEN, *contestant.*

THE SURROGATE.—The first question raised by the exceptions to the referee's report arises upon the following state of facts: Prior to his death the decedent occupied apartments in one of the tenement houses of which he was the owner, together with his wife and

other members of his family. The members of his household discharged the duties of janitor and housekeeper on the premises. After his death his widow (who was one of the accounting parties) continued to occupy the same apartments and performed the duties of housekeeper and janitor. Objection was made to the accounts because the executors and executrix failed to charge themselves with the rental of the premises so occupied by the widow, who is likewise executrix. The referee finds that it was necessary in property of this character to have a resident janitor and housekeeper to care for the property, and that it was customary to permit such housekeeper to occupy an apartment free of rent in addition to paying wages (at the rate of $30 a month). Within three months after the death of the testator the executrix (the widow) and the executors agreed that the former should perform the duties of housekeeper and janitor without compensation, but with the right to occupy the apartments free of rent. This exception is overruled.

The important question is as to the construction of the will of the testator. After giving to his wife certain specified property he gives all the residue of his estate, both real and personal, to his executors and executrix in trust, "to pay over to my said wife the one third part of the net income arising therefrom in equal quarterly payments.

"To pay out of the remaining income in each and every year, upon the mortgage now on my Forty-first street property, the sum of $1,000, or so much there-

of, as, in the opinion of my said executrix and executors or the majority of them, my estate can afford.

"To pay over, distribute and divide all the rest and residue of the said income to and among my children, share and share alike, in equal quarterly payments; and in case of the death of any of my children leaving issue, I direct that the said issue shall take and receive the share the parent would have received if living.

"On my youngest child attaining the age of 25 years, if my said wife shall not then be living, and in case my said wife is living at that time, then upon her death, to sell and convert my said estate into cash and to pay over and distribute and divide the proceeds thereof to and among my children, share and share alike, the issue of any deceased child to take the share the parent would have taken if living.

"In case my son shall desire to go into business before attaining 25 years of age, my executrix and executors may, in their discretion, advance to him upon his share in my estate, such sum as to them may seem meet and proper."

Subsequent to the death of the testator, one of his children, Mary McEwen (who had married during his lifetime), died, leaving her surviving a child, who has since died, in this state, leaving as his only heir and next of kin his father.

It is not disputed but that Thomas A. McEwen, the husband of the deceased daughter, as the administrator of his wife, is entitled to receive whatever income became due and payable to her before her death, or

that he is not entitled to whatever income became due and payable to his son before the latter's death.

The question to be determined is as to the rights of Mr. McEwen in future income, and whether or not he became entitled on the death of his wife and son to their share in the residuary estate of the testator.

If each child, or the issue of a deceased child, took on the testator's death a vested estate in an undivided one fourth part of his property, descendible on the death of any child to its heirs or next of kin, then Mr. McEwen is entitled to future income and to share in the residuary estate at the expiration of the trust.

If, on the other hand, the gift of the testator's estate was to his children, or the issue of any deceased child who survived the trust term—that is to say, if the gift was future and contingent—then the report of the referee is correct.

A very learned note on the subject of the vesting of estates will be found appended to the report of the case of Delafield v. Shipman, 18 *Abb. N. C.* 297.

I deem the recent decision in Goebel v. Wolf, 113 *N. Y.* 405, decided in April, 1889, as controlling in this case. That was an action for the construction of the will of decedent, who died leaving a widow and four children (one of whom had since died) surviving him. The question arose upon the residuary clause of the will which devised the residuary estate to trustees, who were to collect the income and pay all charges; to pay one half of the net income to his wife for the support of herself and minor children; to apply the other half to mortgages, and other liens upon real estate; after the mortgages were discharged,

that one half was to be invested in real estate for the benefit of the children; to carry on business until his youngest child arrived at majority, with certain conditions; to invest the net profits of said business, after deducting compensation to the trustees for their services upon real estate, etc., all other personal property to be invested for the children; to pay each of the children as they arrived at majority or marry $3,000; upon the arrival of the youngest child at 21 years of age (in case the wife was not then living) to divide all the estate and accumulations among his children "share and share alike," after deducting all advances made, as above provided to any of my children, so that each of my children shall have and receive an equal share of my estate. Should my wife be living at the time my youngest child arrives at the age of 21 years, that it is my wish and pleasure that no division of my estate shall be made until after the death of my said wife."

It was held that each child took a vested remainder, in one fourth of the residuary estate, dependent upon the termination of the trust, and the share of one who died descended to his heirs or next of kin, according to the nature of the property, and that such descendants were entitled to any income that may hereafter accrue during the trust period. The features in which that case resemble the one at bar are apparent.

As I read the will in the case at bar, the intentions of the testator are well defined. His first desire was to provide for his widow during her life out of income, then for the discharge of the mortgage out of income,

if it could be done, and then all the residue of income for his children equally. But the principal was not to be divided and distributed until his youngest child (the only male) had reached the age of 25 years if his widow was then dead, or at her death. He desired, however, that this restriction should not prevent his son's entering into business life before that time, and he therefore provided that the executors might make advance to him for that purpose "upon his share in my estate, such sum as to them may seem meet and proper."

"It is a general rule that a postponement of the time of payment will not, of itself, make a legacy contingent, unless it be annexed to the substance of the gift; or, as it is sometimes put, unless it be upon an event of such a nature that it is to be presumed that the testator meant to make no gift unless that event happened." Loder v. Hatfield, 71 *N. Y.* 98.

No such presumption could arise here, for the event was certain to happen, and such a presumption is conclusively negatived by the provision for an advancement to the son.

This last provision is significant. The fact that an advancement was authorized to be made to a beneficiary before the period fixed for the division, has been considered as proof of an intent by the testator that the shares should vest in the beneficiaries at his death. Goebel v. Wolf, *supra;* Everitt v. Everitt, 29 *N. Y.* 69.

It seems clear that the testator intended that each of his children should have a share in his estate, payable at a future time, but in the interim for the trust

term, income or interest should be paid to them quarterly. This has been held to be "indicative of the intent of the testator that the legatee shall at all events have the principal, and is to wait only for payment until the day fixed." Warner v. Durant, 76 *N. Y.* 133; Smith v. Edwards, 88 *N. Y.* 92; Manice v. Manice, 43 *N. Y.* 369.

Much stress is laid upon the principle, that in a controversy between the heir and a stranger, the claim of the heir has the advantage. If there be two equally probable interpretations of the will, the one should be adopted which prefers the blood of the testator. Quinn v. Hardenbrook, 54 *N. Y.* 83, and other authorities cited on the briefs of the learned counsel for the executors and for Bella Malcolm.

Such is the law, but I am unable to perceive its application here. To my mind, we are not driven to the consideration of probable interpretation. We have a perfect certainty of the meaning and intent of the testator.

There is also another well settled principle which may be appropriately resorted to in this case, and which it seems to me, fully justifies the interpretation I have given to this will, viz.: a construction which leans to the vesting of legacies must always be encouraged, and we must seek diligently for evidences of such purpose and intention, and we must not make the will "over to suit our own notions of what might have been wisest." (Judge FINCH, in Smith v. Edwards, 88 *N. Y.* 109.) I have thus reached a conclusion adverse to that of the learned referee, and must

therefore sustain the exceptions to his conclusions of law as to the rights of Mr. McEwen.

Another question must be disposed of, which it seems to me ought not to be here. The record shows a stipulation, in open court, before the referee, by counsel representing the executors, and the objectant, "that the executor shall be charged with interest on all unexpended balances" to be charged quarterly. On this stipulation, the learned referee charged 3½ per cent. This was error. The plain meaning of the stipulation is that such interest should be at the legal rate. The fact that the executors deposited the moneys of the estate in a savings bank which allowed them but 3½ per cent does not necessarily relieve them from liability for interest at the legal rate.

The objectant should have an opportunity to introduce proof on the point which, of course, may be met by the executors. To the extent of 3½ per cent at least they are clearly liable to be reckoned at quarterly periods. Upon this question alone, this proceeding must go back to the referee.

In all respects, except as herein indicated, the report of the referee is confirmed.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—November, 1889.

MATTER OF LAYTIN.

In the matter of the judicial settlement of the account of WILLIAM LAYTIN *and others as trustees, under the will of* WILLIAM LAYTIN, *deceased.*

Where a house is left by testator to his wife during her life and it becomes necessary to take out the old plumbing and replace it by a new and improved system of plumbing, which is of such a character that it is a permanent improvement, and calculated to be of benefit to the remaindermen, the expense of the change will be apportioned between the life tenant and the remaindermen *pro rata*, taking into consideration the present value of the life estate and the value of the reversionary interest.

D. E. MEEKER, *for trustees.*

D. T. WALDEN, *for general guardian of* EDITH *and* MARY DAVIDSON *minors.*

THE SURROGATE.—The testator, by his will, devised a house and lot in the city of New York to his wife for life, and bequeathed to her an annuity of $7,000. The trustees now claim a credit, as against the *corpus* of the estate, of upwards of $1,000 for moneys expended by them in re-plumbing the said house. No evidence has been given in the case, and the facts rest wholly in the statements made by counsel; they appearing to assume that this court has sufficient knowledge on the subject to enable it to determine the question intelligently. In this respect, it must be admitted, they are laboring under a mistake.

It is stated that the old plumbing had become so defective, or out of repair, that the water ran down and injured the inside walls of the house, and that the house had become almost untenantable, and dangerous to health in consequence of foul odors engendered; and that, in the judgment of the trustees, it became necessary to take out the old and replace it by new, and on an improved system of, plumbing.

How long the new plumbing shall answer its purpose, the court, in the absence of the testimony of those skilled in such matters, has no means of knowing, but, for the purposes of this matter, will assume that it is a permanent improvement and calculated to be of benefit to the remaindermen.

It is not of the character of an ordinary repair, like that of a burst pipe, which the life tenant is bound to make. If this be so, it is also a great benefit to the life tenant, and the expense must be apportioned between them. There being no evidence of the value of the house and lot, or of the age of the life tenant, this apportionment cannot here be made, but may be done on settling the decree. The present value of the life estate, as ascertained, will be deducted from the whole value of the property, and the remainder will be the value of the reversionary interest and the expense will be apportioned *pro rata*, as between those several amounts.

The counsel for Melville Boyd, the general guardian of Edith and Mary Davidson, although he filed objections to other items in the account, has, in his brief submitted, confined himself exclusively to the charge for plumbing. It is fair to infer that he has abandoned

all other objections, and they have not been critically considered. It may be remarked, however, that on a cursory glance, they do not appear to be tenable.

NOTE. As to repairs by testamentary trustees, see Matter of Odell, 1 *Connoly Surr. Rep.* 94.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—December, 1889.

MATTER OF WRIGHT.

In the matter of the judicial settlement of the account of CHARLES S. WRIGHT, *as general guardian of* FLORENCE WRIGHT, *an infant.*

The general guardian of an infant filed a petition praying for the judicial settlement of his accounts, and a decree revoking his letters of guardianship. The application was partly based upon allegations of the guardian that disputes and disagreements had arisen between the guardian and the trustee of the estate; that unfriendliness between himself and the trustee of the estate existed, and that the minor desired some other person than himself to be appointed her general guardian. Upon the presentation of the decree upon the accounting, for settlement, it was *held:* that as, notwithstanding the discharge of the guardian in this proceeding, another settlement of his account might be compelled (Code Civ. Proc., § 2837), the decree should judicially settle and state the account as between the guardian and ward, showing the balance which existed in favor of the guardian without any direction whatever as to its payment.

Further held, that under the circumstances recited, the infant should bear all the allowance awarded to the special guardian upon the accounting, and that the general guardian should be disallowed all costs beyond the ordinary costs of an accounting without contest.

ACCOUNTING of Charles S. Wright, guardian of Florence Wright, infant.

MATTER OF WRIGHT.

Former applications in this matter are reported in 1 *Connoly Surrogate Reports*, pp. 281, 287.

The facts appear in the opinion of the Surrogate.

N. D. DITMARS, *for* CHARLES S. WRIGHT, *guardian.*

BENJAMIN B. FOSTER, *special guardian of* FLORENCE WRIGHT, *an infant.*

THE SURROGATE.—The guardian herein, on October 30, 1889, filed a petition praying for the judicial settlement of his accounts, and a decree revoking his letters of guardianship. One of the grounds on which he bases his application for the revocation of his letters is, that disputes and disagreements as to the income of the trust estate have arisen between him and the trustee, which have been the cause of applications to the court, involving expense. He believes that the trustee is unfriendly to him, that the interests of the minor would be promoted if another guardian were appointed, and that that would be more in accordance with the ward's wishes. He also alleges that the minor desires that some other person than himself be appointed for a general guardian. The ward is the only daughter of the guardian.

The accounts were filed, and a considerable sum in excess of income was allowed upon the accounting to the guardian, he having established to the satisfaction of the Surrogate his inability to support the infant out of his own earnings, thereby justifying application of the ward's estate to her support.

The decree upon the accounting is now presented for settlement, and the question arises as to the propriety of directing a judgment in favor of the guar-

dian against the ward, and of the manner in which the costs of the proceeding are to be paid. An important consideration in determining this point is the fact that under section 2837 of the Code, notwithstanding the discharge of the guardian in this proceeding, his successor or the ward may compel another judicial settlement of his account, in the same manner and with the like effect as if this decree had not been made, and his sureties continue to be liable until his account is judicially settled in accordance with this section. The present proceedings are, therefore, necessarily tentative. I think that this consideration alone would control, so far as decree against the infant is concerned.

The decree should judicially settle and state the account as between the guardian and ward, showing the balance in favor of the guardian, without any direction whatever as to its payment.

Upon the question of costs, I consider the decision in Matter of Jones, 4 *Sandf. Ch.* 615, influential; in that case it was held that a trustee applying to be discharged from his trust, there being no cause for it other than his wish to be relieved from its duty, the court will impose, as terms of discharging him, that he bear the costs of the petition and the appointment of a new trustee, and that he be not allowed any commissions on the capital of the trust funds.

The consideration of commissions to the guardian herein is disposed of by his stipulation waiving the same.

The principle enunciated in Matter of Jones, *supra*, has been followed in Brautigam v. Escher, 2 *Dem.*

269, where it was held that the testamentary trustee retiring from office for his own convenience could not receive out of the trust fund an allowance to defray the expense of the proceedings to procure his discharge.

In Matter of Allen, 29 *Hun* 7, the principle was applied so far as to disallow a trustee retiring under such circumstances, commissions on the capital of the estate.

The principle of law followed in the cases above cited is recognized in Phillips v. Lockwood, 4 *Dem.* 299, decided in 1886 by Surrogate ROLLINS.

In the case at bar it will be noticed that the desire for the substitution of another guardian is mutual, and the history of the proceedings shows that unfriendliness, if not animosity, exists between father and daughter, and the relations between the trustee of the estate, through which the ward derives her property, and the father are inimical.

My opinion is that the costs should be apportioned in the following manner: The infant should bear all the allowance awarded to the special guardian. The accounting party should be disallowed all costs beyond the ordinary costs of an accounting without contest.

In addition to the fact that his retirement from the office of guardian is to a large extent for his own convenience, some weight should be given to the fact that the reference was made necessary by, and the contest related solely to, the allowance to the guardian of expenditures made prior to his appointment as such as well as after, which were allowed to him on the principle that had he made application to the court in

proper time, it would have been granted to him. Had he procured his appointment and made application at the proper time the necessity for this contest would have been avoided. The accounting and the contest arose purely and simply out of his neglect to make this application in proper time. I think the court was sufficiently considerate when it allowed to him expenses before his appointment as guardian and taxed the ward's estate for the excess of his disbursements in her behalf after his appointment.

MONROE COUNTY.—HON. JOSEPH A. ADLINGTON, SURROGATE.—November, 1889.

MATTER OF WILLARD.

In the matter of the judicial settlement of the account of WILLIAM A. WAUGH, *executor of the will of* JOHN R. WILLARD, *deceased.*

Testator left to his wife his personal property absolutely and the use of his real estate for life, and the real estate was directed to be sold at her death and the proceeds distributed to his descendants. There was a judicial settlement of the account of the executor, to which the widow alone was cited, and under the account as then presented a balance was found due from the estate to the executor. Upon a subsequent accounting, to which all the parties in interest were cited, it appeared that at the time of the prior accounting there was an amount in his hands sufficient to pay all the debts of the estate, including a claim of his own. *Held*, that the executor could not on the second accounting maintain a claim for his debt against the realty of the estate.

Under section 2740 of the Code of Civil Procedure, which suspends the running of the Statute of Limitations upon a claim of an executor or administrator against a debt due from the decedent to the accounting

party from the time of the death of the decedent to the first judicial settlement of the account of the executor or administrator, the Statute of Limitations begins to run against such a debt from the time of a judicial settlement of the account of the executor or administrator in proceedings wherein one interested party only, *i. e.*, a legatee of the personalty and life tenant of the real estate, is cited.

FINAL accounting of William A. Waugh, executor of the will of John R. Willard, deceased.

W. D. SHUART, *for executor.*

M. E. LEWIS, *for contesting legatees.*

JOHN M. STEELE, *for guardian.*

THE SURROGATE.—The above named testator died August 31, 1874. His will was admitted to probate September 24, 1874, and letters testamentary were on that day issued to William A. Waugh. By his will, the decedent gave to his wife Sarah V. Willard all his personal property absolutely, and the use of his real estate during life. After the widow's death, the real estate was to be sold, and the proceeds distributed in unequal sums among the descendants of the testator.

The widow died on January 12, 1889, and thereafter the decedent's real estate was sold by the executor for $4,956.06, and an expense of $47.84 was incurred in making the sale. No controversy arises over this part of the executor's proceedings. This proceeding for a final settlement was begun by the executor on June 14, 1889, and all persons interested in the above mentioned fund have been duly cited.

On the hearing herein, the executor presented a claim in his own favor for $381, and interest from October 2, 1874, which he seeks to have allowed out of the proceeds of the real estate. This claim is

founded upon a note for $500, dated February 26, 1870, given by the decedent to Mr. Waugh, the executor. Upon the note are several indorsements, the last being for $50, dated June 6, 1874.

The contestants resist this claim, and insist that the testator's personal estate was ample to pay all his debts, including this note held by the executor. They also maintain that this claim is barred by the Statute of Limitations.

To determine the question so raised, it is necessary to ascertain the amount of the decedent's assets and liabilities, and to know what the executor has done in the matter before the pending proceeding was instituted.

It appeared that on July 30, 1879, this executor filed in this court a verified petition, in which he alleged that he desired to render an account of the proceedings in the administration of this estate, to have such account finally settled, and a decree of final settlement entered thereon according to law. The petition further alleged that the widow, Sarah V. Willard, was the only legatee under the will of the decedent, although in fact, there were seven other legatees entitled to citation. *Rev. Stat.*, part 2, chap. 6, art. 3, tit. 3, § 70.

Citation was issued upon the petition, returnable August 21, 1879, and was served on Sarah V. Willard only. The executor's account in said proceeding was not verified until December 27, 1879, and on the same day a decree of final settlement was entered therein, signed by my predecessor in office. That decree states that the assets of the estate amounted to

$1,308.08, that the executor had paid out on account of the estate $1,753.65, leaving balance due him of $445.57.

The executor's account in the present proceeding alleges the entry of the aforesaid decree, and the finding of the said balance in his favor, but the executor's counsel concedes that the contestants are not bound by said decree.

A copy of the former account is annexed to and made a part of the present one. That former account relates exclusively to the personal estate of the testator, and professes to account for its disposition.

Subject to payment of debts and legal charges, the personalty under the will went to the widow whose estate is not represented herein. In the pending proceedings the contestants are only concerned with said old account for the purpose of ascertaining whether or not the personal estate was sufficient to pay all debts of the testator and the charges of settling his estate. If there was enough for that, no claim can be maintained for the proceeds of the realty. Turning now to the copy of the former account annexed to, and made a part of the account in this proceeding, I find that the sum total of the personal assets with which the executor therein admits that he is chargeable, is $1,754.57, instead of $1,308.08, as stated in the decree of December, 1879, and that the executor credits himself with the payment of various items amounting to $1,753.65 and including commissions $57.70; executor's expenses $65.70, and his own note against the deceased, $528.94.

It therefore appears that when he made the afore-

said settlement in 1879, the executor had received and was accountable for a sufficient sum to pay all known claims against the estate, his own included. Moreover, the evidence taken on this hearing shows that $50 of the item $65.70 for executor's expenses mentioned above, was money paid by the executor to himself in excess of commissions, for personal services, which is contrary to law. Collier v. Munn, 41 *N. Y.* 143; Morgan v. Hannas, 13 *Abb. N. S.* 361.

The executor had no right to deduct his commissions until they had been allowed by the Surrogate or to pay his own claim. Carroll v. Hughes, 5 *Redf.* 337; Wheelright v. Rhoades, 28 *Hun* 57; *Rev. Stat.*, pt. 2, ch. 6, title 3, § 33.

The payment of taxes by the executor was proper under the authorities. Mygatt v. Washburn, 15 *N. Y.* 320; Matter of Babcock, 115 *N. Y.* 450.

It must accordingly be held that the decedent's personalty was ample to pay all valid claims against his estate, and the executor's claim upon the proceeds of the realty must be disallowed. The claim of the executor is also barred by the Statute of Limitations, and the protection of that statute can be claimed whenever the demand is presented. Treat v. Fortune, 2 *Bradf.* 116; Warren v. Paff, 4 *Id.* 260; Burnett v. Noble, 5 *Redf.* 69.

The following provisions of the Revised Statutes and of the Code of Civil Procedure regulate the payment and proving of all claims of this character, as well as the running of the Statute of Limitations against them, viz.:

"No part of the property of the deceased shall be

retained by an executor or administrator in satisfaction of his own debt or claim until it shall have been proved to and allowed by the Surrogate." *Rev. Stat.*, § 33, cited above.

"Upon a judicial settlement of the account of an executor or administrator, he may prove any debt owing to him by the decedent." Code, § 2739.

"From the death of the decedent, until the first judicial settlement of an account of his executor or administrator, the running of the Statute of Limitations against a debt due from the decedent to the accounting party . . . . . is suspended . . . . . After the first judicial settlement of the account of an executor or administrator, the Statute of Limitations begins again to run against a debt due to him from the decedent." Code, § 2740.

What is meant by "judicial settlement" in the provision last quoted is declared by subd. 8, § 2514 of the Code as follows:

"The expression, judicial settlement, where it is applied to an account, signifies a decree of a Surrogate's Court, whereby the account is made conclusive upon the parties to the special proceeding, either for all purposes, or for certain purposes specified in the statute."

Applying these provisions of the statutes to the case in hand, it seems very clear that the executor's demand is barred by the lapse of time.

There was a "judicial settlement" of the account of this executor on December 27, 1879, by which the account then rendered was made conclusive on the decedent's widow, the sole party cited in that proceed-

ing. The claim of the executor was subject to the six years' limitation; the statute has run against it long before the commencement of this proceeding.

The executor's counsel argues that the judicial settlement of 1879 did not set the Statute of Limitations in motion against the executor, because the contestants are not bound by that proceeding. But that theory stands directly opposed to the plain language and evident intent of the Code as above quoted.

There must be a decree disallowing the claim of the executor herein, and directing the distribution of the fund to those entitled thereto.

ALBANY COUNTY.—HON. FRANCIS H. WOODS, SURROGATE.—December, 1889.

MATTER OF LOCKWOOD.

In the matter of the application for probate of the will of SELEY LOCKWOOD, *deceased.*

Decedent executed a will, leaving all his property to charities, to the exclusion of his relatives, except a sum to his executor "large enough to be over and above any bribe that may be offered by my sisters, brothers and children for the redemption of this will, and their heirship to my estate." The decedent had been many years before in an insane asylum, but had been discharged "improved." He had numerous delusions for a long time prior to his death, believing that his relatives were trying to poison him, that he was threatened by devils, and numerous other delusions, chiefly relating to supposed attempts on his life. He displayed the usual intelligence of people of his condition of life in relation to his business transactions, which were all of a simple char-

acter. The subscribing witnesses to the will, who were but slightly acquainted with testator, believed him to be of sound mind at the time of its execution. *Held*, that the testator had not testamentary capacity, and that the probate of the will must be refused.

APPLICATION for the probate of the will of Seley Lockwood, deceased.

The facts appear in the opinion of the Surrogate.

STEDMAN, THOMPSON & ANDREWS *and* CHAS. F. TABOR, *attorney general, for the proponent.*

EMORY A. CHASE *and* NATHANIEL C. MOAK, *for contestants.*

THE SURROGATE.—Seley Lockwood died at South Westerlo on the 20th of October, 1888, aged 72 years. On the 10th of February, 1880, he executed the proposed will, with the formalities required by law, in the presence of two witnesses who had seen him only a few times, and knew very little of him, or of his antecedents. His estate consisted of personal property only, deposited in savings banks, and which had been so kept for many years. A considerable portion of it was in the National Savings Bank at Albany, and the other books of his bank-deposits were left thereat by him for safe-keeping. Mr. Stephens, the executor named in the proposed will, is the secretary of the bank. In this will, Mr. Lockwood bequeathed one half of his property to the State Lunatic Asylum at Utica, and the other half to the Orphan Asylum at Albany; and he inserted therein a provision to this effect: "I give and bequeath to my executor, Albert P. Stephens, of Albany, a sum from my estate as high as one quarter, large enough to be over and above any bribe that may be offered by my brothers, sisters

and children for the redemption of this will and their heirship to my estate." This will is a holograph, entirely in decedent's handwriting; but as he had executed another will in presence of one of the subscribing witnesses to this one, but a short time before, and had one drawn about that time by a Mr. Robbins, the contents of which did not appear, it may have been copied therefrom.

Decedent had resided most of his life in the neighborhood where he died. He once went South, but to what point does not appear. At another time, he went West, near Kansas City, and at another time, from January 10, until October 9, 1849, when about 33 years of age, he was an inmate of the insane asylum at Utica; having been taken there by his brother George and by one Henry Myers who is now dead. On the 9th of October, 1849, he left the asylum in company with his brother "improved." It does not appear that he ever entirely recovered, and I think it quite evident that he never did. He inherited about seven or eight thousand dollars from his father and a sister, and at the time of his death he had over twenty-three thousand dollars on deposit in the savings banks. He was a very close, penurious man. He made sharp bargains; wore poor clothing, which he made himself; and it is said that he usually wore about three suits of clothes at one time. He boarded about among his relatives, paying twenty shillings a week for his keeping; for which he always took receipts, which he himself made out. It appears that his brothers and sisters joined with him in deeds of land which they inherited with him, he receiving the agreed con-

sideration, and the money which he inherited was paid directly to him. It does not appear to have been claimed that he was deranged as to his mere pecuniary transactions. He was evidently quite sane, methodical and sensible upon such matters. But I do not see how such transactions reflect upon his peculiarities and delusions upon entirely different subjects. His usual business transactions, as shown upon the trial, were brief, simple and all of a similar character, inquiries as to deposit of money, deposits thereof, occasionally changing the deposits and receipts of interest. It appears that he invested some money in a savings bank at Kansas City which failed; and, after his return home, Mr. Stephens, of the National Savings Bank, collected one or more dividends for him from the receiver of the broken bank.

The peculiarities of the decedent were numerous and striking. He took borax "to weld up his inwards." He refused to take food until others had taken of it, for fear it had been poisoned, and would kill him. He asserted that chloroform angels had saturated his bed clothing to kill him; that his relatives and Indians were endeavoring to shoot him. He always put a quantity of salt into his tea, to destroy the poison which he claimed had been put therein to kill him. He made ginger tea; and, if bubbles arose in the boiling of it, he threw it away, because he said the bubbles showed it was poisoned. That he had been accustomed to drink milk, and suddenly refused to use any more, stating that that offered to him had been poisoned, and that milk was an article which could be easily poisoned. He said that his relatives,

with whom he was boarding, intended killing him with an axe-helve which was being polished, and also with a horse-file. Though the plates from which he ate were clean, he usually blew upon them, to throw off the poison which he supposed had been placed thereon for him to take. He refused to drink tea which he did not see poured out, though the tea had been prepared by his own sister. He busied himself for hours—sometimes for half a day at a time, under the floor of his house sticking an old bayonet into the earth; "killing devils," as he said. He claimed that a drain from the house had been dug for a grave for him, and that his relatives intended to kill him, and to bury him in it. For half a day at a time, he dug holes about two feet deep in the earth around the house, pouring water therein, to drown out the devils; and when the existence of the devils was questioned by the hired man of his father, he flew into a rage, and threatened to kill him. He usually carried a pistol for the purpose of protecting himself from his enemies. He frequently declared that his relatives were banded together to kill him, and thus obtain his property; and that this was revealed to him by the birds at night. He asserted that while in the South he built a house without windows or doors,—sliding a board back to get in, and then replacing it; and that he built it thus so that the "gang" could not get in. He said that he invented the first steamboat, and the first engine that was ever built. He would sit in a rocking chair and rock violently, alternatively laughing and crying, with his hands spread over his face, peeking through his fingers. He said he saw a man

coming out of the cellar of his brother Amiel's house, when he was stopping there, to kill him for his money; and that his brother's wife was the worst of them. He frequently cleaned out the wash dish after it had been cleansed, claiming that it had been poisoned. There were numerous other acts and things of a similar character, but those hereinbefore enumerated are sufficient to show decedent's condition of mind.

Though displaying the usual intelligence of people of his condition of life relative to business transactions, I am satisfied that at the time of going through the formalities of executing this will, and for many years previous, decedent was laboring under the insane delusion that his relatives and next of kin, who would inherit his property if he died intestate, were his enemies, and were combined to kill him in order to obtain his property.

I am persuaded that the alleged will must be rejected, in that it is unnatural and strange upon its face. The provision for preventing the bribing of the executor,—a gentlemen of the very highest character; the disinheriting of every relative, and the giving of his estate to charities (of one of which he is not shown to have any knowledge)—might not *per se* be sufficient to justify me in declaring the will invalid, but coupled with his delusions and his condition of mind, require such a determination. Though the subscribing witnesses give their opinion that he was of sound mind when he executed the will, the transaction of execution was very brief. They knew him but slightly, and their testimony must be weighed in connection with the light thrown upon his mental

condition and delusion by all the evidence in the case. If a will be made and executed under such a delusion which operated upon the decedent and induced him to make it, it cannot be upheld, though the testator's general capacity be unimpeached. *Schouler, Wills*, §§ 159, 161; Morse v. Scott, 4 *Dem.* 507; Matter of Doorman, 5 *Dem.* 112. If it be evident that the disposing provisions in the will were the result of it, and were caused by such a delusion, the instrument cannot be supported as such. Matter of McCue's Will, 17 *W'kly Dig.* 502; Society v. Hopper, 33 *N. Y.* 624, 625; Clapp v. Fullerton, 34 *N. Y.* 190; Keeler's Will, 12 *St. Rep.* 155–157; Matter of Weil, 1 *N. Y. Supp.* 91. The rule is so well settled that it could hardly be proper or allowable to extract from these cases at length to prove it. It is true that the case of Keeler's Will was reversed (3 *N. Y. Supp.* 629; 20 *St. Rep.* 439), but it was on the ground that the testator's belief in spiritualism was not sufficient to invalidate his will; that his declarations of hostility to his relatives were merely declarations of aversion and dislike; and that in bequeathing all his property to his wife he was doing a just act, as against those who had no just claim upon his bounty. The court, however, recognizes the correctness of the rule that if the testator was in fact influenced in making his will by an insane delusion as to his relatives, the will would have been invalid. This case is quite unlike that of Vedder's Will, 6 *Dem.* 92, decided by me in 1888. In that case I held that "there is no evidence whatever to show that any or all of these beliefs, delusions, eccentricities or peculiarities had the slightest connec-

tion with or influence upon her testamentary act, here in question, and further that testamentary capacity is to be measured by its relations to the testamentary act," and "that a person having any insane delusion relating to the property, the persons concerned, or the provisions of the will, is incapable, while delusions which in no way relate to these do not, as a matter of law incapacitate." It will thus be seen that I was careful in that case to lay down precisely the rule which I have applied in this. The probate of the alleged will must be refused.

CAYUGA COUNTY.—HON. JOHN D. TELLER, SURROGATE.—December, 1889.

MATTER OF GIBSON.

In the matter of the judicial settlement of the account of JAMES SEYMOUR, JR., *as executor of the will of* WILLIAM M. GIBSON, *deceased.*

A direction in a will that the payment of a general legacy must be made as soon after testator's death as the circumstances of his estate shall render such payment convenient, does not amount to a special direction that the payment must be made earlier than the time prescribed by law, nor does such a legacy to one to whom the testator does not stand *in loco parentis*, draw interest from the time of the death of the testator.

Interest on a general legacy begins to run in one year from the death of the testator, although such legacy is by the statute (2 *Rev. Stat.* p. 90, § 43) not payable until after the expiration of one year from the granting of letters testamentary.

FINAL accounting of James Seymour, Jr., as executor of the will of William M. Gibson, deceased.

MATTER OF GIBSON.

The facts appear in the opinion of the Surrogate.

GEORGE UNDERWOOD, *for executor.*

PAINE & O'BRIEN, *for* SARAH FOSTER.

C. I. AVERY, *for the residuary legatees.*

THE SURROGATE.—William M. Gibson died December 31, 1887. Letters testamentary upon his will were issued February 21, 1888. The first clause of the third codicil of this will is as follows: "In consideration of the affection I have for Sarah Devoe, who has long been a member of my family, and as a recognition of the kindness, care and attention bestowed by her upon my wife, and myself, and as a compensation for the services rendered by her to me, I hereby give and bequeath to her the sum of five thousand dollars ($5000) and direct that the same be paid to her as soon after my decease as the circumstances of my estate shall render such payment convenient." By the second clause of this codicil the testator gives said Sarah Devoe all of his household furniture, and household utensils, except such articles as his executor shall see fit to dispose of otherwise. The testator left no children or lineal descendants surviving him. The legatee, Sarah Devoe, who has since married, and is now Sarah Foster, claims interest upon the legacy of $5,000 from the time of the death of the testator, and insists that if this is not allowed, she is entitled to interest from the expiration of one year from the testator's death. On the other side, it is contended that she is entitled to interest only after the expiration of one year from the granting of letters testamentary. It appears by the ac-

count, that "Sarah N. Foster, formerly Sarah Devoe, on compromise of her claim for services" was on the 2d day of April, 1889, paid by the executor the sum of $5,000, and that on the same day she was paid the full amount of her legacy, less the sum of $250 reserved for collateral inheritance tax. She was of full age at the time of the testator's death. For this reason, and that it does not appear in this proceeding that the testator stood *in loco parentis* to this legatee, it cannot be held that she is entitled to interest from the time of the testator's death. No other ground therefor is suggested by her counsel and none occurs to the court. The direction that the payment must be made as soon after the testator's decease as the circumstances of his estate shall render such payment convenient, does not amount to a special direction that the payment be made earlier than the time prescribed by law. Rogers v. Rogers, 2 *Redf.* 24.

The remaining question, whether interest upon a general legacy begins to run one year from the death of the testator or one year from the time letters testamentary were issued, is interesting, in view of the conflicting answers found in the reports and elementary works. Under the common law, the rule was well established that a general legacy, for which no time of payment was assigned by will, bore interest from the expiration of a year after the death of the testator. The rule had its origin in the practice of the ecclesiastical courts of England where a year was allowed the executor to ascertain the amount of property to be distributed, before he was required to pay legacies. Interest was given as compensation for any

delay in payment, after that time. The Revised Statutes changed the rule as to the time of payment of legacies to one year from the granting of the letters testamentary or of administration unless the same are directed by the will to be sooner paid. 2 *Rev. St.*, p. 90, § 43. Whether this enactment involved a change in time from which interest upon legacies was to be collected has been the subject of much diversity of opinion. In the case of Lawrence v. Embree, 3 *Bradf.* 364 (decided in 1855), the learned Surrogate held that the provisions of the Revised Statutes relative to the payment of debts and legacies, have not changed the rule as to the payment of interest. He says, "If a delay in the probate is to deprive legatees of interest on their legacies because the executor cannot be compelled by the Surrogate to pay before a certain time elapsed after letters issued, a premium for delay and contestation would be awarded and great injustice be sanctioned by the law. I am quite clear that the rules governing the payment of interest on testamentary bequests remain as they were, according to the established principles of courts of law and equity." In Matter of Fish's Estate, 19 *Abb.* 209, also reported in Tucker's Reports, at page 122, Surrogate TUCKER held that interest on general legacies commences to run from the period of one year from the issuance of letters testamentary, and refers to the *dictum* of Chief Justice GARDNER in Bradner v. Faulkner, 12 *N. Y.* 472, that no interest would accrue until it became by law the duty of the executors to pay the legacy." The case of Fish's Estate was appealed to the General Term of the Supreme Court, and there reserved *sub*

nomine Campbell v. Cowdrey, 31 *How.* 172. The doctrine of the Surrogate as to the time interest begins to run upon general legacies was disapproved by two of the three judges. Presiding Justice INGRAHAM concurred with the view taken by the Surrogate in Lawrence v. Embree, and stated that he saw nothing in the case of Bradner v. Faulkner to the contrary. In the case of Cooke v. Meeker, 36 *N. Y.* 15, in the Court of Appeals, we have the remarkable fact of two prevailing opinions in which one of the learned judges says the provisions of the Revised Statutes have not changed the rule of the common law as to the time when interest on legacies begins to run, viz., at the expiration of one year from the testator's death, and quotes Lawrence v. Embree with approval (page 18) while the other learned judge expresses the opinion that interest is not payable on a legacy until a year from the granting of letters (page 23). The report of the case informs us that all the judges except two concurred in both opinions (page 25). In the case of Wheeler v. Ruthven, 74 *N. Y.* 428, we have light thrown upon the subject in the opinion of Mr. Justice ANDREWS, who says: "The general rule is well settled that where a general legacy is given, without assigning any time for payment, it bears interest from the expiration of a year after the death of the testator. . . . . It is a legitimate consequence of an omission by the executor to pay a legacy when payment is due, that the legacy should bear interest from that time, as a compensation for the delay; and therefore, the time when the legacy is payable determines the time from which interest commences."

The case merely called for a decision as to whether the testatrix designed that certain legacies should draw interest during the pendency of a life interest, and the attention of the court does not appear to have been called to the effect of the provisions of the Revised Statutes upon the common law rule referred to in the opinion. In the case of Thorn v. Garner, 113 *N. Y.* 198, it is said: "The statute prohibits the payment of legacies until a year after the granting of letters testamentary; and the general principle is that interest upon legacies is not payable until the principal becomes due." In this case, a legacy was directed to be paid to a son in eighteen months after the testator's death. The legatee claimed interest from the time of his father's death. The court held that he was not entitled to any interest on the legacy previous to the time fixed in the will for its payment. So far as the question now under consideration is concerned, the *dictum* above quoted was *obiter*. In the case of Bradner v. Faulkner, 12 *N. Y.* 472, the proposition is stated that no interest would accrue until it became, by law, the duty of the executors to pay the legacy. This case is frequently referred to as authority for the rule that interest upon general legacies cannot run until the time prescribed by the statute for their payment; but the question was not before the court for decision, and this inference has not been uniformly drawn from the case by our courts. The point in question could not have been in the mind of the learned judge who gave the opinion, when he wrote: "As the statute prohibits the payment of legacies until one year from the time of

granting letters testamentary, and as the practice of the court prior to the statutes, allowed the same time to the executor," etc. If he had not in mind the common law rule, it may be supposed he would have modified this as well as the incomplete statement that no interest would accrue until it became by law the duty of the executors to pay the legacy. It has never been the duty of the executor to pay a legacy before he could collect assets sufficient for the purpose, and yet interest has, both before and since the passage of the statute been held to accrue at the end of a year. In the case of Dustan v. Carter, 3 *Dem.* 149, Surrogate ROLLINS reviewed the case of Bradner v. Faulkner, and followed the decision in Campbell v. Cowdrey, holding that interest upon a general legacy begins to run at the expiration of one year from the death of the testator. In the case of Carr v. Bennett, 3 *Dem.* 433, the learned Surrogate of Onondaga county, has, after a lengthy review of the English and American authorities upon the subject, arrived at the conclusion that he is well supported in accepting as a general rule, that by statute general legacies are not payable until one year from the issuing of letters testamentary but draw interest from the expiration of one year after the testator's death at common law. He refers to the danger which might arise from the adoption of the other rule in that a residuary legatee who, in case of administration of the will annexed would be first entitled to letters, might by delay in obtaining them create for himself property at the expense of the general legatee. Many other dangers might be anticipated from the working of a rule adjusted to a sliding

scale, to be managed by an interested party, and, unless the doctrine that interest shall only accrue from the time the principal is payable is inviolable, it is wiser to preserve the doctrine of the common law as to the payment of interest. There are many cases in which real estate has been devised, charged with the payment of legacies, and which the devisees upon accepting the devises became personally liable for the legacies. In these cases, the devisees like any other debtors were properly held liable to pay interest from the time the legacies were payable. Interest is given for delay of payment from the party whose duty it was to pay. In the case of a general legacy, the penalty for delay would rarely be borne by the person who caused it. It is not just to place the two classes of cases in the same category, although the former is found cited in some of the elementary books to support the broad doctrine that general legacies bear interest only from the time they are payable. In speaking of the common law rule as to interest upon general legacies, Chancellor HARDWICKE in Beckford v. Tobin, 1 *Ves. Sr.* 310, said: "The rule is strengthened by the statute of distribution giving one year in the case of intestacy to distribute; . . . . yet it was not founded upon that statute, being a rule of this court before, who took it from the ecclesiastical court, which gave the executor a year to get in the estate and pay the legacy, before he should be compelled to give an account. In Pearson v. Pearson, 1 *Schoales & L.* 10, the chancellor refers to the fact that the rule applied independently of the fact that the testator's estate was abundantly solvent and yielding interest, in which

case the interest would go to the residuary legatee or that the fund did not come to be disposable for the payment of legacies till many years after the testator's death. The rule appears to have been arbitrarily adopted, as fixing the time when the executor or administrator ought, in the generality of cases, to be able to pay general legacies, for which no particular time was specified; and when as between general and residuary legatees, the former ought to be considered to be due. It assumed that the executor would enter at once upon the discharge of his duties. It had no regard for delays in obtaining authority to act or in collecting assets. Our statute, in view of complications which might arise in the settlement of estates, from paying legacies before the time had expired for advertising for claims, and thereby determining the amount of indebtedness against an estate, has prohibited the payment of legacies prior to the time such advertisement might expire. It can hardly be presumed that the legislature by this act intended to change the relative rights of legatees as to property. The act is in derogation of the common law, and I think, cannot under the ordinary rules of construction, be held to have abrogated the law relating to interest. It is an innovation upon the common law and should not be extended in its operation beyond its fair import and intent. Mushlitt v. Silverman, 50 *N. Y.* 360. Upon authority and principle, the ancient rule that general legacies, except as otherwise expressly directed, shall draw interest from one year after the death of the testator, is to be followed, and interest upon the legacy in question will be so allowed.

CHAUTAUQUA COUNTY.—HON. DANIEL SHERMAN, SURROGATE.—December, 1889.

MATTER OF MILLER.

In the matter of the estate of ADAM MILLER, *deceased.*

The testator had signed a non negotiable joint note as one of the sureties. The claim of the payee, duly verified, was presented to the executor, and the executor, who was a legatee under the will of testator, and two other witnesses, also legatees, testified that upon such presentation, the executor denied that the estate was liable on the note, and told the claimant that he must look to the makers thereof for payment. This testimony was contradicted by the claimant. The attorney for the claimant testified that he had a talk with the executor; that the executor then said that the testator was surety on the note, that it was the debt of the makers, and that they ought to pay it, and that that was all that was said. He also testified that there had been no objection or notice of rejection given to him prior to a written one which was sent to him twenty months after the presentation of the claim, that the executor disputed the claim on the note and offered to refer it under the statute.

Held, that the evidence failed to show such a rejection of the claim as would compel the claimant to sue within six months thereon, under Code Civil Procedure, § 1882, to prevent the claim from being barred.

Further held, that the written notice of rejection was too long delayed, and that such delay amounted to an allowance of the claim by the executor.

PETITION of Eliza Banks, a legatee under the will of Adam Miller, deceased, to compel Charles Q. Miller, the executor, to judicially settle his accounts, and pay her the legacy to which she is entitled under the will. During the proceedings brought by this legatee the question arose as to whether or not the executor had rejected a certain claim of one E. M. Spink, a creditor of testator.

MATTER OF MILLER.

J. G. RECORD, *for creditor.*

W. B. HOKER, *for the executor and legatees.*

THE SURROGATE.—It appears that the deceased made his will dated July 17, 1883, which was probated April 27, 1885, and appointed his son, Charles A. Miller, sole executor.

The deceased left him surviving three children, said Charles A. Miller, Ann Eliza Banks and Esther E. Reed, and his widow, Eliza Miller. He gave his entire estate, valued at about $5,000 to his said three children, share and share alike, giving nothing to his widow. By a written agreement between the widow and his three children, the widow is to have one fourth of his estate and the children each one fourth.

A petition was presented by said Ann Eliza Banks to compel the executor to account and pay her legacy, in which proceeding the question arose and was litigated as to whether the claim of about $1,000 of E. M. Spink, a creditor, had been allowed or rejected by the executor.

It appeared that on March 27, 1882, W. H. and Frank Baldwin borrowed of Spink $1,484 for which they gave him their note payable in the September following, which was signed by John Miller and said Adam Miller, the testator, as sureties, and the Baldwins gave to the two Millers a chattel mortgage on farm property for their indemnity; that the Millers refiled the mortgage during two or three years only; that a portion of the mortgaged property was burned about the year 1887, when covered by an insurance, from which a part of the $350 was paid and endorsed

on the note, March 26, 1887, being the last of the several payments made thereon; that a part of the mortgaged property was sold from time to time, and the proceeds of a part of same paid upon the note, and a part of the property of little value remained unsold and in the possession of the Baldwins at the time of the trial herein, and a portion of the same property was worn out and used by the Baldwins on their farm. The note or obligation so given was joint in form, not negotiable.

The claim of the creditor, Spink, duly verified was presented by him to the executor at the former residence of the testator, in the presence of his widow and the two daughters named, on May 31, 1887. Mr. Spink, the creditor, the executor and two daughters testified as to what occurred on that occasion as to whether the claim was then rejected or allowed; and the substance of the evidence of each is as follows:

E. M. Spink, creditor, testified that he personally handed the claim to the executor, Charles A. Miller, who read it, and that he told him it was a claim Judge Warren had made out against the estate. That the executor at no time said anything about not paying the claim; that he had before asked the executor to see the Baldwins and get security from them; that the executor did not tell him to look to the Baldwins for his pay. The payments on the note were made to Judge Warren, his attorney, by the Baldwins.

Ann E. Banks, the legatee, testified: "I recollect Spink coming to our house only once. I heard my brother Charles tell him that our estate was not holden for that claim, that he must look to the Baldwins.

My mother, Charles, Mr. Spink, and Esther E. Reed were present. I was not there all the time Charles was. I was not in when Spink came in. Nothing more was said. I never heard him, Charles, verbally reject the claim. Early in February, 1889, when Charles came back from Ohio, we talked about this claim."

Esther E. Reed, legatee, testified: "Mr. Spink came to my mother's in the latter part of May, 1887. I heard talk between him and Charles in the sitting-room. I heard Charles say that father's estate wa'n't holden for that claim; that he wa'n't holden for it, and that he referred it to the Baldwins. I don't recollect anything else. I did not hear it all."

On her cross-examination, the witness testified:

"I was there sewing, helping mother to go West with Charles. We talked of this in our family when she went West. It had been talked at our house in our family, in February, 1889. Mrs. Banks was there, and we talked it over, and agreed what was said. We were talking of our business. I did not hear much what Spink said when he presented the claim; he talked very low. I heard Baldwin's name mentioned several times. I was across the room, not very near to them when they were in the house. I was busy sewing. They were close together, quite a few steps from me. My brother Charles said father's estate wa'n't holden for that claim; that Mr. Spink would have to look to the Baldwins for the claim; I could not hear and don't know what Spink said. I am a legatee under the will. I did not see Charles until February, 1889."

Charles A. Miller, executor and legatee, testified: "Spink came to the house, and presented his claim to me. I looked at it and saw what it was. I told him it did not belong to the estate to pay. He said he had waited a good while and did not want to make me any trouble, but he should have to proceed to collect it. This is the substance. Then I said I could not do anything about it, as executor; that I could not pay it; that I had no right to pay it; that he would have to go and see the Baldwin brothers or those on the note before my father's name. As he went out of the door, I stepped out on the stoop, and he wanted to know if I couldn't, as I had the property in my hands, pay him and fix it up with the Baldwin brothers and my uncle, John Miller, that I could do better with them than he could, and he talked there several minutes, and begged of me to go and see them and see if I could not get them to fix it up, that I could get security from them better than he could. I told him that I did not think I could. I do not remember that anything else was said. I did not tell him I had been advised about the claim. I had before this taken advice of Judge Lambert, and of an attorney in Akron, Ohio, as to my liability on this note. My home was at this time in Akron."

On his cross-examination, the witness testified: "Spink spoke of my having property of estate in my hands as executor, not of Baldwins, given to Miller as security for signing. I said it belonged to the Baldwins to pay, and not to the estate to pay. I don't remember that I did; and am not positive I told him I

had taken counsel about the claim. I am positive I did either in the house or out-of-doors on the stoop."

E. M. Spink, recalled, testified: "Charles A. Miller did not state that his father's estate was not holden for that claim. He did not state that he had taken counsel on the claim, nor that he could not pay the claim, nor that it did not belong to the estate to pay, nor that I must look to the Baldwins for it."

It appeared in evidence that E. F. Warren had the note in his possession as attorney for Spink from about the time it was given, March 27, 1882, until after the last payment was made in February, 1888, during which time ten payments were made on the claim to Warren as attorney for Spink by the Baldwins.

It appeared that about September 1, 1888, the note was about to outlaw as to John Miller, he not having made any payment on it, and that Spink was about to commence an action in the Supreme Court, and papers were prepared by Warren for service upon the Baldwins and John Miller, when an arrangement was made under the advice of Warren as attorney for Spink, by which the note of which the following is a copy, signed by the Baldwins and John Miller was given for the amount due to Spink on his claim.

"$971.82.

"One year after date I promise to pay to the order of E. M. Spink nine hundred and seventy-one dollars and eighty-two cents with interest for value received.

"Dated September 5, 1888.

(Signed) "W. H. BALDWIN,
"F. W. BALDWIN,
"JOHN MILLER."

Spink by the arrangement made, continued to hold the original note or claim against the estate of Adam Miller. It also appeared in evidence that on the 11th day of February, 1889, Charles A. Miller, executor, served personally on Spink, notice of rejection of the claim of which the following is a copy:

"FREDONIA, New York, February 11, 1889.

"To E. M. SPINK, ESQ., and HON. E. F. WARREN, his attorney.

"Sir,—You will please take notice that I doubt the justice and validity of your claim of $1,484, with interest from March 27, 1882, less several payments against the estate of Adam Miller, and I hereby dispute the same and offer to refer it to be approved by the Surrogate.

"I am yours very truly,

"CHAS. A. MILLER.

"Executor of the last will and testament of Adam Miller, deceased.

"Copy for Judge Warren."

On the following day, Spink returned such notice to Miller the executor, with the following notice endorsed thereon:

"This notice is returned on the ground that it has not been served in season.

"Yours, etc.,

"E. F. WARREN,

"Attorney for E. M. SPINK.

"February 12, 1889."

No evidence was given as to the solvency of the

Baldwins, except that W. H. Baldwin, who testified that he did not know about the responsibility of his brother, F. Baldwin or John Miller, but as for himself, he owned property above incumbrance enough to pay this note.

E. F. Warren, who was attorney for Spink, held the claim, during several years, and received and endorsed all the payments upon it, testified that the new note was given under his advice, as the old one was about to outlaw as to John Miller, who had made no payment upon it, and that was the only reason for giving the new note. He also testified that as attorney for Spink, on January 25, 1887, he wrote a letter to Charles A. Miller, at Akron, Ohio, about this note, the first one, and soon afterwards had a talk with Miller about it, and that said Miller then said that his father was surety on the note, that it was Baldwins' debt and that they ought to pay for it, and that that was all there was said. He also testified that there had been no rejection or notice of rejection given to him prior to the written one, February 11, 1889.

I am of the opinion, after a careful examination of the evidence and authorities bearing upon the question involved, that what was said when this original claim was presented to the executor on May 31, 1887, did not amount to a legal rejection or dispute of the claim so as to require the creditor to offer to refer or to sue in six months thereafter to prevent the short Statute of Limitations from barring the claim as provided by § 1822 of the Code of Civil Procedure. I am not satisfied that the creditor understood that the claim was rejected. It appears that the executor and

his counsel must have so understood it from his serving the written notice of rejection one year and eight months afterwards. It was then too late. The claim had then become liquidated, adjusted and allowed by lapse of time and by the silence and acts of the executor.

In Lambert v. Craft, 98 *N. Y.* 344, a controlling case on the question involved, less than two months elapsed from the presentation of the claim to its attempted rejection, and the court says that "under these circumstances, the executors are either chargeable with knowledge of the fairness of the claim or were bound to some degree of active diligence in ascertaining whether it was just, and their silence might well be deemed a substantial allowance of it as a debt to be paid in due course of administration."

In this case as in that above cited, the executor had a direct personal interest as a legatee in the estate, out of which payment was required, and he had full knowledge of the condition of the estate and character of the claim, making it all the more imperative upon him to have given decided, unequivocal and absolute notice of rejection. I think that such notice was not given in this case. In this case, which is similar to Hoyt v. Bonnett, 50 *N. Y.* 538, the alleged rejection appears to have been made on the ground that the debt was one that the Baldwins should pay, and not on the distinct claim of illegality.

In the case last cited, the Court of Appeals says: "Justice to claimant, as well as the reasonable interpretation of the statute, requires that the act of the executor or administrator in disputing or rejecting

the claim which is to put the claimant to an action within the brief period prescribed, upon pain of forfeiting his claim, should not be ambiguous or equivocal, capable of two interpretations, but decidedly unequivocal and absolute, and that to construe and apply the statute in a manner more liberally to representatives of estates would make it a trap and a snare to claimants." Kidd v. Chapman, 2 *Barb. Ch.* 414; Barsalou v. Wright, 4 *Bradf.* 164.

There is an equitable side to the question involved. There was no direct proof showing the value of the farm property covered by the mortgage given for indemnity to Adam and John Miller by W. H. and F. Baldwin. And in the absence of such proof it appears a reasonable presumption that it was of sufficient value to indemnify them as sureties against this claim of Mr. Spink, who was chiefly instrumental in securing the new negotiable note signed by John Miller and the Baldwins, dated September 5, 1888, upon the payment of which by the executor the estate will be entitled by subrogation to the possession and ownership of such note, as well against John Miller as the Baldwins. In the event of the non-payment of the note by the Baldwins, this estate would have to pay its equitable share of the resulting loss with John Miller.

The Millers negligently permitted the mortgaged property to remain in the possession of the Baldwins against the interest of Spink, until a portion of it was worn out and used up by the Baldwins, also neglected to keep the security good by filing a copy of the mortgage from year to year after the first two or

three years; some of the property was burned in 1887, how much does not appear, neither does it appear how much of the insurance money was used in the payment of the $350 indorsed on the Spink claim, May 26, 1887.

It would appear that as the executor and John Miller must have had knowledge of such material proofs and should have presented same, and not having done so, the reasonable presumption is that the real facts of the case within their knowledge would have been against them if proved.

I direct a decree, adjudging that the creditor duly presented his claim; that the executor neither legally disputed, rejected nor offered to refer it, but allowed it; and that he pay same with interest out of the estate in his hands with costs in this proceeding.

CHENANGO COUNTY.—HON. WILLIAM F. JENKS, SURROGATE.—April, 1889

MATTER OF WOOD.

Application for the probate of the will of SABRAH G. WOOD, *deceased.*

Where a will has been found in the safe of testatrix carefully preserved among her valuable papers, with the signature erased, and then carefully restored, this, in the absence of other proof, does not raise a presumption of an intention to revoke the will, and such will should be admitted to probate.

MATTER OF WOOD.

PROBATE of the will of Sabrah G. Wood, deceased. The facts appear in the opinion of the Surrogate.

GEORGE W. RAY *and* WILL C. MOULTON, *for the executors.*

DANIEL T. ARBUCKLE, *attorney for* EVA H. ROBERTS *and* ALICE N. HARRINGTON, *contestants.*

I. S. & H. D. NEWTON, *attorneys for* KITTIE A. JOHNSON, *contestant.*

THE SURROGATE.—On the 20th day of July, 1864, the testatrix duly executed and published the will that is now offered for probate. The will was in her handwriting down to the concluding clause "in testimony whereof," etc., which, with the attestation clause, was written by one of the witnesses in the presence of the other witness, and at the time the will was executed.

After the death of the testatrix, the will was found at her residence in a locked drawer in her safe, which was also found locked. It was in an envelope with her name upon the outside in her own handwriting.

The contestants object to the admission of the will to probate, on the ground that the paper offered is not her will. It is conceded that it is the same instrument that was duly executed as her last will, but it is claimed that at some time subsequent to its execution, it was duly revoked by the testatrix, by the erasure of her signature to the will, and that if the present signature thereto is in the handwriting of the testatrix, it was not legally re-executed and published as her will.

It is apparent from an examination of the paper, that the signature of the testatrix has been erased, first by drawing diagonal lines over the name, and then near-

ly erasing such lines, and the name itself. The evidence is quite conclusive that the instrument now bears the genuine signature of the testatrix and that it is in the same condition as when taken from her safe. Her name appears to be carefully re-written over the original signature. It is written with ink of a different color from that used in the body of the will or by the witnesses at its execution, but the evidence shows that the testatrix might have used different ink from that used by the witnesses.

I am unable to find as a fact from the evidence of the surviving witness and from the appearance of the instrument itself, that the erasure was made either before or at the time of its execution, and there is no evidence in the case that throws any light as to when it was done, or why it was done. With the burden of proof resting upon the contestants, I cannot presume as matter of law that the erasure was made at some time subsequent to the execution of the will. When an interlineation or erasure in a will is fair upon its face and entirely unexplained, there is no presumption, in the absence of any suspicious circumstances, that it was fraudulently made after the execution of the instrument. Crossman v. Crossman, 95 *N. Y.* 145; Matter of Voorhees, 6 *Dem.* 162.

I am asked by the contestants to presume as matter of law that the erasure was made *animo revocandi* with intent to revoke and destroy the will, and that the act was sufficient to accomplish the intent.

2 R. S. part 2, chap. 6, title 1, art. 3, p. 64, § 42, (4 R. S. [8th ed.], p. 2548,) provides that "no will in writing . . . . . nor any part thereof, shall be revoked

or altered, otherwise than by some other will in writing . . . . . or unless such will be burned, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same by the testator himself."

In Timon v. Claffy, 45 *Barb.* 447, it was held that the testator may destroy his own will at any time or in any mode or manner he pleases. And it need not be attested by witnesses. Schouler on Wills, § 388.

If the testatrix cut out her own name from the will with clear intent to revoke it, it is a sufficient destruction. *Id.*, § 389. Leaving off the seal with like intent would have the same effect. *Id.* So would drawing lines over the testator's name, *animo revocandi*, even though the signature is still legible. *Id.*, §§ 392, 393, 401, and notes; Jackson ex dem. Howard v. Holloway, 7 *Johns.* 394, or if the signature is erased with a pencil, Woodfill v. Patton, 76 *Indiana* 575; 2 American Probate Rep. 200.

But whatever the means employed for defacing or destroying the will, a free and rational intention to revoke must accompany the act, or the revocation will not be valid. Schouler on Wills, § 384. The mere act of cancelling is nothing unless it be done *animo revocandi.* Jackson ex dem. Howard v. Holloway, *supra.*

Had the will been found with the signature of the testatrix erased and not re-written, the legal presumption would have been that it was cancelled and revoked by the testatrix *animo revocandi.* Matter of Clark, 1 *Tuck.* 445; Woodfill v. Patton, *supra*; Matter of White, 25 *N. J. Eq.* 501.

The proponents having proved the due execution of the will, it is entitled to probate unless the contestants prove its revocation by some one of the modes pointed out by the statute. Williams on Executors, (6 Am. Ed.) 196; 2 Wharton on Law of Evidence, § 894; Abbott Trial Evidence, § 73.

If the will had been found in her safe carefully preserved among the valuable papers of the testatrix, with her signature erased, it would be a fair and reasonable presumption, that she erased the signature *animo revocandi*. And it would then be lacking in one of the statutory requirements of a valid will—the signature of the decedent at the end thereof; but when found with the signature carefully restored no such presumption arises.

In the absence of all proof how can I find that it was made with the intent to revoke, when the instrument was preserved by her, with her signature carefully restored? An intention to revoke a will not fully consummated is revocation. Doe d. Perkes v. Perkes, 3 *Barn. & Ald.* 489. The cancellation of a will does not necessarily involve its revocation. The cancelling itself is an equivocal act, and in order to operate as a revocation must be done *animo revocandi*. 2 Wharton's Law of Evidence, § 900; Dan v. Brown, 4 *Cow.* 483, 490.

It may be that Mrs. Wood drew the lines through her name with the intention of revoking the will, but immediately and before the act was completed, changed her mind, erased the marks and restored her signature. To sustain the theory of the learned counsel for the contestants I must find that the erasure

was made by the testatrix herself, understandingly, freely and voluntarily, with no other purpose than to destroy her will and that it was done at some time previous to the act of re-writing her name; and this finding is asked for in the absence of proof and with the burden resting upon the contestants, to establish the fact of revocation. In Matter of Prescott, 4 *Redf.* 178, it was held that when the testator, after the execution of his will, made erasures and interlineations therein, without intending to revoke, and without re-executing the same, the will will be admitted to probate as originally executed.

Mere tearing or destruction, without intention to revoke is no revocation. 1 Jarman on Wills, 302, Randolph & Talcott's Edition.

"If a testator is arrested in his design of destroying the will, by the remonstrance or interference of a third person, or by his own voluntary change of purpose, and thus leaves unfinished the work of destruction which he had commenced, the will is unrevoked; and the degree in which the attempt had been accomplished, would not, it should seem, be very closely scrutinized, if the testator himself had put his own construction upon his somewhat equivocal act, *by subsequently treating the will as undestroyed.*" *Id.*, p. 289.

In Bethel v. Moore, 2 *Dev. & Batt.* 316, Chief Justice RUFFIN said, "It may be admitted that the slightest act of cancellation, with intent to revoke absolutely, although such intent continues only a moment, is a total and perpetual revocation, and the paper can only be set up as a new will. But that is founded on

the intent. When therefore there appears what may be called a cancellation, it becomes necessary to look to the extent of it, at all the conduct of the testator, at what he proposed doing at the time, and what he did afterwards, to satisfy the mind whether that was meant in fact, as a cancelling, immediately and absolutely or only conditionally, upon the contemplation of something else then in mind, for, although every act of cancelling imports *prima facie* that it is done, yet it is but a presumption which may be repelled by accompanying circumstances."

It may be that the erasure was made by another person in the presence of the testatrix and by her direction and consent. But under the provisions of sec. 42 of the Revised Statutes it would not operate as a revocation of the will unless proved by two witnesses.

In Sprigge v. Sprigge, 1 *Law Rep. Prob. & Div.* 608, the testator made his will and afterwards became insane. It was proved that after its execution it was in the custody of the testator and was last seen in his desk about two months after its execution. After his death the will could not be found. A revocation of the will was pleaded. The court said: "The presumption of law in this state of things under ordinary circumstances, is, that it was destroyed *animo revocandi.* It appeared in this case that the testator, during a considerable portion of the time that elapsed between the making of the will and his death, was insane. The question, therefore, arises, whether the court ought to apply the ordinary presumption of law in such a case. . . . . The short proposition is, that the bur-

den of showing that the revocation was done not after the testator became insane, but when he was of sound mind, is cast on those who set up the revocation. In this case there was no evidence to show when it was done. Therefore those who sought to set up a revocation failed in establishing the facts on which the presumption of revocation would rest." The court cited with approval Harris v. Berrall, *Swab. & Trist.* 153.

Sprigge v. Sprigge and Harris v. Berrall are approved in Benson v. Benson, 2 *Law Rep. Prob. & Div.* 172, in which Lord PENZANCE says, that "the will having been proved to be well executed, the court must in some way or other, be satisfied affirmatively, that it was revoked before it can pronounce against it. There is a lack of evidence as to the time when the act of cancellation was done. It is conceded that if it were done before the wills act came into operation, it would amount to a revocation, and that if it were done afterwards it would not amount to a revocation. . . . . I hold that the burden of proving that the crossing out of the signature was done at a time, when according to the law of this country, it could effect a revocation, lies on those who assert a revocation; and in the absence of such proof, I am bound to pronounce for the will."

In Matter of King's Goods, 2 *Robertson's Ecc. Rep.* 403, after the death of the testator his will was found with his original signature erased, but another signature by him appeared a short distance beneath: *Held* that the original signature was not erased *animo revocandi*, as required by the wills act, and that in the

probate the original signature must be restored and the second signature omitted. Schouler on Wills, § 392.

In accordance with these views and the authorities cited, a decree will be entered admitting the will to probate.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—September, 1889.

MATTER OF SMITH.

In the matter of the estate of HANFORD SMITH, *deceased.*

Good faith and honesty will not always save a trustee from removal from his office. It is sufficient to justify such removal, that a trustee has failed to charge himself with the rents received by him, both before and after the testator's death; and especially where the evidence shows this to have been done with the intention of concealing from the interested parties the reception of such rents, which intention was persisted in until discovery made its further continuance impossible.

APPLICATIONS to remove a testamentary trustee. There were two proceedings brought against this trustee, one by Mrs. Drinker and others, and one by Hanford Smith and others. These proceedings were argued together.

DILLOWAY, DAVENPORT & LEEDS, *for* MRS. DRINKER *and others.*

DILL, CHAMBERS & SEYMOUR, *for* HANFORD SMITH *and others.*

OVID DUPRE, *for the trustee.*

APLLICATION OF MRS. DRINKER AND OTHERS.

THE SURROGATE.—The evidence which is now before the court shows that the learned referee has found that the respondent collected before the death of the testator the sum of $1,063, and afterwards the further sum of $465, and that she failed to charge herself in her account with any part of these sums, and that she was charged with the same by a decree of this court, entered upon the report of a referee holding her liable for it. The learned referee herein, however, decides that her failure to charge herself with the moneys collected was not the result of dishonesty or bad faith, and concludes, as matter of law, that she was not guilty of any misconduct for which she could be removed. This conclusion of law seems to be deduced solely from the finding of fact as to the absence of dishonesty and bad faith in omitting to charge herself with the collections stated. It is apparent that the learned referee has not considered whether the acts or omissions in question, although done, or omitted to be done, in good faith, and with no dishonest purpose, might not involve such an improper application of administration of the funds of the trust or such an improvident management thereof, or such other misconduct in the execution of the trust as would justify the removal of the trustee. That the utmost good faith and honesty would not, in a multiplicity of instances readily suggested as coming within the cases mentioned, save a trustee from removal from his office, is manifest. The statute plainly recognizes this. Section 2817, subd. 2, Code Civil Procedure; Matter

of Stanton, 1 *Connoly Surr. Rep.* 108; Morgan v. Morgan, 3 *Dem.* 616.

I have very carefully examined and considered the evidence which has been adduced before the learned referee, and am unable to reach any other conclusion than that which follows.

The testimony of the respondent given upon the previous reference, and which has been admitted in evidence, discloses to my mind an intention on her part, existing at and previously to the time of the filing of her account, and afterwards persisted in until discovery made impossible its further continuance, to conceal from the parties interested the fact of her reception of the rents collected, and to convert the same to her use. This conduct I deem such dishonesty as would warrant her removal. Aside from this, and assuming that she had no knowledge of the amount of the rents she received in the month of May, previously to her father's death, which I do not believe she should at once, upon the death of her father (which occurred on the 11th of May) or at least as soon thereafter as she had received her letters, have informed herself of their amount, and the disbursements made from them; as she knew, I am satisfied, from the evidence that any balance remaining constituted assets of the estate, for which she was accountable as executrix. Her testimony with regard to the rents received from Wolfe since the death of the testator, and her attempted explanation of her omission to charge herself with them, evidence such a degree of carelessness and inattention as prove her to be an unsafe guardian of the property of others. Her conduct with respect

to the rents collected, before as well as after her father's death, is such as to satisfy me that she has not shown that fidelity which the law exacts from a person in her position; but, on the contrary, she has so improvidently and faithlessly managed the property committed to her charge as to render her an unfit person for the due execution of her trust. Section 2817, subd. 3, Code Civil Procedure, and cases above cited. It is hardly necessary to add that the fact that the trustee satisfied the decree which charged her with the rents in question—a decree which would have been enforced by proceedings for contempt—does not relieve her from liability to removal. Matter of Wiggins, 29 *Hun* 271.

I have thus reached a conclusion opposed to that arrived at by the learned referee, and am therefore constrained to overrule his report, and decide that the respondent should be removed from her office as trustee.

APPLICATION OF HANFORD SMITH AND OTHERS.

THE SURROGATE.—The evidence warrants the findings contained in the report of the referee, and also the disposition which he made of the requests to find of the petitioner Hanford Smith. The provisions of the Code as well as the cases cited below, show that it is not necessary to find that the respondent was dishonest, although it is not entirely beyond doubt that she was not. Nor is it necessary to find that she was improvident, in the general sense of that term, to justify her removal; but the grounds specified in the referee's report are sufficient, and compel the court to decree her removal. Code Civil Proc., § 2817, subd.

2; Matter of Stanton, 1 *Connoly Surr. Rep.* 108; Morgan v. Morgan, 3 *Dem.* 616. The case of Emerson v. Bowers, 14 *N. Y.* 449, referred to by the respondent's attorney upon the argument has no application, as the facts relied upon for the removal of the trustee in the present proceeding were not then grounds for removal, and, of course, were not considered. The Code of Civil Procedure has since made them such grounds. See the section of Code above cited.

NIAGARA COUNTY.—HON. A. K. POTTER, COUNTY JUDGE.—November, 1889.

MATTER OF NICHOLLS.

In the matter of the petition of MARK A. NICHOLLS.

The provisions of Section 414, Ch. 4 of the Code of Civil Procedure, providing that the word "action" is to be construed when necessary so to do, as including a "special proceeding," limit the remedy in the Surrogate's courts just as absolutely as the various remedies in other courts are limited, and in regard to proceedings in Surrogate's courts the chapter must be read as if "special proceeding" were substituted whenever the word "action" occurs.

The duty of an administrator to account is "an obligation or liability expressed or implied" within the first subdivision of section 382, and the right to compel such an accounting is therefore barred in six years after such right has accrued.

The duty of accounting, on the part of an administratrix exists independently of her obligation in her bond so to do, and application by her bondsmen to compel her to account is not within the provisions of section 381, Code of Civil Procedure, which provide for a limitation of twenty years in an action on a sealed instrument.

An administrator is not a trustee in any such sense as to prevent the Statute of Limitations running in his favor.

MATTER OF NICHOLLS.

APPLICATION by Mark A. Nicholls as executor of a bondsman of Dorothy Lull, administratrix, to compel her to account as such administratrix.

The administrators interposed an answer, setting up the Statute of Limitations as a bar to the right of petitioner to call the administratrix to account, and to this answer the petitioner demurred.

L. F. & G. W. BOWEN, *for petitioner.*

J. E. & C. W. POUND, *for administratrix.*

A. K. POTTER, COUNTY JUDGE, acting as SURROGATE.—This is a special proceeding instituted by the petitioner, Mark A. Nicholls, to compel the administratrix to render her final account.

Mrs. Lull was appointed administratrix of her husband's estate, April 19, 1869.

Silas H. Marks became one of her sureties on the bond given by her as administratrix at the time. Marks has since died, and the petitioner is executor of his will, and instituted this proceeding under section 2726 of the Code.

No account has ever been rendered by the administratrix.

A petition having been filed and a citation issued February 11, 1889, the administratrix interposed an answer on the return day, setting up the statutory limitation of six years, and also the ten year statute, which she urges as a bar to the petitioner's right to maintain this proceeding, and to this answer the petitioner demurred. This presents the question whether

the Code has put a limitation upon a proceeding of this kind in Surrogates' courts, and if so, what it is.

Chapter IV. of the Code provides in terms for the limitations of actions, but the last clause of section 414, requires the word "action" "to be construed when it is necessary so to do, as including a special proceeding." The same section also declares that chapter to contain the only limitation existing for said proceedings.

This provision from its language and context seems intended to limit the remedy in Surrogates' courts, just as absolutely as the various remedies in other courts are limited; and the chapter must therefore be read as if the words "special proceedings" were substituted wherever the word occurs.

The duty of an administrator to account is an "obligation or liability, expressed or implied, "within the first subdivision of section 382.

Doubtless the word "obligation" has long been used in a restricted legal sense, being applied generally to some instance providing for the payment of money in the nature of a bond, recognizance, etc.

But the context indicates that it is used here in a broader sense. The word contract which precedes it in the context would cover every case of "obligation" within this limited sense, and it seems plain that the words "obligation or liability" were intended to enlarge the scope of the provision beyond what the word "contract" would give to it; the definitions given by Bouvier and Webster are quite broad enough to cover the duty of an administrator to account.

In the provision relating to arrest under the old

Code (§ 179) the word "obligation" was used, and it was there held to be used in its broad sense, including legal duties. Crandall v. Bryan, 15 *How.* 48, 55.

The word liability does not seem to be used in quite as broad a sense as the word obligation in general use, and yet the two words are used synonymously.

The following authorities tend to support the construction here given, though they did not arise under the Code as it now is. Matter of Van Epps, 64 *How.* 464; Cole v. Terpenning, 25 *Hun* 482; Leroy v. Bayard, 3 *Bradf.* 228; Warren v. Paff, 4 *Id.* 260; Loder v. Hatfield, 71 *N. Y.* 92.

But if this section does not cover this proceeding, certainly section 388, which provides a ten-year limitation in all cases not specially provided for, is broad enough, and for the purposes here it does not matter which section is invoked.

The petitioner urges that the twenty-year limitation (§ 381) is the one which covers this proceeding, if any one does, which he denies.

If this proceeding were based upon the bond upon which Marks was surety, assuming it to be in the usual form, this claim would be plausible, as that bond doubtless provided that the administratrix should obey the decree of the Surrogate, and he is authorized to require her to account. But this duty of accounting does not rest on that obligation. It exists independently of any such contract liability.

It is also claimed by the petitioner that the administratrix is a trustee, and so the statute does not run. But the courts have repeatedly held that administrators and executors are not in such sense trustees as to

bring them within that rule. Cotter v. Quinlan, 2 *Dem.* 29. See also Clock v. Chadeagne, 10 *Hun* 97; Clark v. Ford, 1 *Abb. App. Dec.* 359; in which cases it was held that the six year statute protected an administrator or executor as against next of kin or legatees, which could not be if the technical rule as to trusts applied to them.

Section 1819 of the Code does not seem to interfere with this limitation of such proceeding.

Doubtless an action at law, after demand, could be maintained by a next of kin, for his distributive share of this estate. But the bond required in such case does not bind the sureties to respond to a judgment of a court of law or equity, and so the liability of the sureties is not extended in duration by that provision.

The demurrer must be overruled, and an order will be entered accordingly.

NOTE.—To the same effect see Matter of Dunham, 1 *Connoly Surr. Rep.* 323; Matter of Clayton, *Id.* 444; Matter of Underhill, *Id.* 541.

KINGS COUNTY.—HON. GEORGE B. ABBOTT, SURROGATE.—January, 1890.

MATTER OF SKILLMAN.

In the matter of the judicial settlement of the account of CATHERINE N. CURTIS, *and* ROBERT G. WATERBURY, *as executors of the will of* JOHN SKILLMAN, *deceased.*

The proceeds of the sale of part of the property of a corporation, apportioned by a resolution of the directors among the stockholders, are capital and not income, and therefore belong, not to a life tenant of an estate, but to the capital account thereof.

ACCOUNTING of Catherine N. Curtis, and Albert G. Waterbury, as executors of the will of John Skillman, deceased.

The facts appear in the opinion of the Surrogate.

J. S. JAN CLEEF, *for the executrix.*

JOHN P. ADAMS, *for* CATHERINE N. CURTIS, *individually.*

E. S. ATWATER, *for* MARY D. VAN EISEN.

H. M. TAYLOR, *for* CATHERINE M. VAN EISEN, *contestant.*

THE SURROGATE.—I agree with the conclusions reached by the learned referee in his report in this matter, except in one particular, to wit: I think the sum of $9,375 received by the executrix in 1870 from the Brooklyn Gaslight Company was capital and not income, and that the referee erred in holding it to be

income to which the life tenant was entitled. The testator gave the income of his personal estate to his wife for life, with remainder over. He died in 1865, and at the time of his death owned stock in the Brooklyn Gaslight Company. This was not disposed of by the executrix, and the dividends, as they accrued, were paid to the life tenant. On October 7th and 25th, 1870, the Brooklyn Gaslight Company passed resolutions, of which the following are copies: "Resolved, that, on the 15th instant, 25 per cent. be apportioned among our stockholders of this date, being the proceeds of the property sold and set off by this company to the People's Gaslight Company, and that the transfer books will close from this date to November 1st, 1870."

"Resolved, That on the 29th of October, instant, 50 per cent. be apportioned among our stockholders of October 7, 1870, being the proceeds of the property sold and set off by this company to the Nassau Gaslight Company."

Edward Storey, secretary of the Brooklyn Gaslight Company, testified that at that time, and since about 1860, the capital stock had been $2,000,000, and has since continuously been $2,000,000, on which it has paid taxes and dividends from that time until now. On cross-examination, he says: Q. "Won't you state what the sale made by your company to the other companies included? A. The street mains, service pipes and metres, and I guess what you might call good will. Q. All your interest in the district as a gas company? A. Yes, sir." He also testified that

the property sold constituted about one half of the whole territory of the company.

This was clearly a sale of one half of the plant or property constituting the assets and capital of the company, and was simply a change of so much of its capital into money. It was not a dividend declared out of surplus earnings or profits, or a fund derived in any way from the earnings of the corporation. The resolutions did not contain the word "dividend," or attempt to characterize what was divided as income, or even call it a division of profits. They simply provide that the proceeds of sale "be apportioned among our stockholders."

If they could sell one half of their property and divide it as income, I see nothing to prevent their so disposing of their whole property, and so dividing it, to the total annihilation of the remainder.

The case of Riggs v. Cragg, 26 *Hun* 89, is similar to this in its facts. Judge DANIELS says (page 106): "A stock dividend of 5 per cent. was declared by the N. Y. Gas Light Co., in October, 1853, which was received by the executors. But it appeared by the evidence that the fund out of which this dividend was made formed no part of the earnings of the company, but it was realized by a sale of its real estate on Canal, Centre and Hester streets, in the city of New York. This dividend accordingly was not governed by the legal principle indicating the appropriation proper to be made of stock dividends declared out of surplus earnings, for it was really made from the proceeds of property constituting a part of the capital of the corporation, and which the directors considered them-

selves justified in declaring in the then financial condition of the corporation. It was not appropriately income received by the estate, but it was in the nature, so far as it extended, of a change in its capital. It was properly, therefore, so regarded by the executors, and it could not be carried into the accounts as the income of the estate."

The Court of Appeals reversed this case on grounds entirely foreign to this question, and say (89 *N. Y.* 487): "The right to stock dividends, as between tenant for life and remainderman, has not been considered by the court of last resort in this state. The decisions upon the subject in other states and in England are conflicting, and it will be the duty of this court, when occasion arises, to seek to settle the question upon principle, and establish a practical rule for the guidance of trustees and others, which shall be just and equitable as between the beneficiaries of the two estates."

In the Matter of Kernochan, 104 *N. Y.* 618, the only dividend decided to belong to the life tenant was one conceded to have been declared out of accumulated net earnings. At page 627, Judge DANFORTH says: "This dividend was numbered '91' in regular order, and was payable and paid at the time the usual quarterly dividends were paid. It appeared also that the assets which formed the consideration of the payment by the syndicate, were accumulated net earnings, represented by cash or securities calling for cash.

This case is not an authority for the contention that proceeds of sale of assets and property, conceded-

ly constituting a part of the capital of a corporation, shall go to the life tenant instead of the remainderman, simply because of a resolution directing the division of such proceeds of sale among stockholders. The early English rule, that all stock dividends, so called, together with all extra cash dividends of bonuses, belong to the remainderman, has been so changed that dividends in money, which come from the earnings of the capital invested, belong to the life tenant. Perry on Trusts (4th ed.), § 545.

The converse of this proposition is that dividends which do not come from the earnings of the capital invested belong to the remainderman. I am of the opinion that the referee erred in crediting the sum of $9,375, so received by the executrix, to income instead of capital. Let the referee's report be confirmed except in this particular.

NOTE.—As to the rights of life tenants and remaindermen, see an article "Title to dividends as between life tenants and remaindermen," 19 *Am. Law Rev.* 737; an article on "Life tenants and remaindermen," 33 *Alb. Law Journ.* 424; a note on the subject, 24 *Amer. Dec.* 169; a note in 18 *Abb. N. C.* 185. As to the rights of reversioners and remaindermen see a note to Allen v. De Groodt (98 Mo. 159) at 14 *Am. St. Rep.* 629. As to premium from sale of securities, see Matter of Lawrence, *ante*, p. 53.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—January, 1890.

MATTER OF GREENE.

In the matter of the estate of CHESTER L. GREENE.

Where money came into the hands of a decedent as a trust fund, and was by him placed with other sums in his own name in bank, and where at his death, he being at that time insolvent, a sum largely in excess of the amount of the trust fund is found on deposit in that bank, and came into the possession of the temporary administrator of decedent, the cestui que trust can follow the trust fund and recover it.

ACCOUNTING of McLean Blair, temporary administrator and executor of Chester L. Greene, deceased.

The facts appear in the opinion of the Surrogate.

PHILLIP CARPENTER, *for temporary administrator and executor.*

CHARLES A. O'NEILL *and* K. R. CASPER, *for creditors.*

WILLIAM J. HARDY, *for* ABBEY J. GREENE.

THE SURROGATE.—This estate is insolvent. Objections were filed to the account by certain creditors on the ground that it did not state that their claims were entitled to preference; that the money owing to them by deceased came into his hands as trust funds and it is theirs and they are entitled to it without deduction. The referee found that, while the funds came as trust funds to the deceased, yet as the contestants had failed to show that these specific sums came to the hands of the temporary administrator or executor, they are not entitled to preference.

It is quite clear that the deposit of moneys by T. M. Fitzpatrick & Bro. with decedent, under the circumstances proven, constituted the same a trust fund, which could not be used for any other purpose than that contemplated by the parties without breach of trust. It is likewise certain that if the funds so deposited were kept apart, they could be recovered by the depositor and would not be liable for the payment of other debts. If these funds had been converted into other property or funds by which they are represented, they could be followed for a like purpose.

"If it appears that trust property has been wrongfully converted by the trustee and constitutes, although in a changed form, a part of the assets, it would seem to be equitable and in accordance with equitable principles, that the things into which the trust property has been changed should if required be set apart for the trust; or, if separation is impossible, that priority of lien should be adjudged in favor of the trust estate for the value of the trust property or funds, or proceeds of the trust property entering into and constituting a part of the assets. . . . . But it is a general rule, as well in a court of equity as in a court of law, that in order to follow trust funds and subject them to the operation of the trust, they must be identified." Cavin v. Gleason, 105 *N. Y.* 262.

In People v. City Bank of Rochester, 96 *N. Y.* 32, the defendant discounted certain notes for one of its depositors who thereafter wishing to anticipate payment, gave the bank their check for the amount, less rebate of interest. These checks the bank received and charged in the firm account. Entries were made

in the books to the effect that the notes were paid. At the time, the firm supposed the bank held the notes, when they had been in fact sold by it before they became due. The bank failed and a receiver was appointed. The firm applied to the court for an order directing the receiver to pay the notes out of the funds in his hands. Held: The application should be granted; that the transaction between the bank and the firm was not in their relation of debtor and creditor, nor that of bank and depositor, but by it a trust was created, the violation of which constituted a fraud by which the bank could not profit, and to the benefit of which the receiver was not entitled.

This last case was referred to in Cavin v. Gleason (*supra*), as follows: "The case of People v. City Bank of Rochester seems to have been misunderstood. The question considered in this case was not raised there, and it was not claimed in that case that the proceeds of the checks of S. H. & Co., the petitioners, had not gone into the general funds of the bank, or that they had not passed in some form to the receiver. The court did not decide that petitioners would have been entitled to a preference in case the proceeds of the check had been used by the bank and were not represented in its assets in the hands of the receiver."

It will be remembered that in the case of Cavin v. Gleason, money was given to a private banker to invest in a bond and mortgage. Instead of doing so, however, he used the greater part of the money to pay his private debts, and it was because this fact of conversion had been proved that the Court of Appeals denied his right to a preference.

The case of Ferris v. Van Vechten, 73 *N. Y.* 113, is clearly distinguishable from the case at bar. That decision rested upon the fact that "there was no proof that one dollar of the moneys received for the lands, and which constituted the trust fund, was paid or applied to any of the purposes mentioned, nor is the fact of such misappropriation of the trust moneys found, nor was any fact proved or found from which such diversion and misappropriation of specific trust moneys can be legitimately inferred." And the court say (p. 125), that the question decisive of the appeal was the competency of the proceedings before the Surrogate to prove the foregoing facts; and the court expressly says that it passes upon no other question.

The mere fact that funds have been commingled is not sufficient to destroy the identity of the fund. Van Alen v. American Nat. Bank, 52 *N. Y.* 1. If it can be shown to have become a part of the assets of the deceased, it will be sufficient. Where trust moneys are misappropriated they often become commingled, and yet courts have followed them and have attached a lien to the entire property in favor of the cestui que trust. Thus, where trust funds are converted by a trustee and invested in real estate, though the trust fund misappropriated may not constitute the entire purchase price of such property, yet they are commingled with and have become a part of the property invested in; in such case, there can be no question but that the cestui que trust, if he can show that the trust fund went into the real estate, would have an equitable lien therefor.

So with moneys deposited in bank with other funds.

If it can be shown that they form a part of the bank account, the cestui que trust would have an equitable lien upon the same.

In the case at bar the money is admitted to have come into the hands of the deceased as a trust fund, and the referee has so found. It is not claimed—there certainly has been no attempt to prove—that he converted it. It is simply established that he placed it with other sums in his own name in bank. A sum largely in excess of the amount of this trust fund is found on deposit with the said bank at the time of his decease, which came into the possession of the temporary administrator and executor. The presumption, if any, is that he did not convert the fund. In fact, there are circumstances tending that the specific fund remained, subsequent to his death, a part of the bank deposit, for after his death the contracts in question on being closed out at a loss, the deficit was made up by the representative of the deceased. Now, from what was the deficit supplied? It could not properly be made up out of the general estate in the first instance; under the terms of the contract it must be made up out of the trust fund. It was made up and paid, and the inference is that there was no wrong committed, but that it was paid out of the fund provided by the cestui que trust for any losses on transactions entered into for his benefit. If the trust fund was not there, the personal representative, when he paid the deficit, gave a preference to the extent of the loss.

The case of People v. Merchants & Mechanics Bank, 78 *N. Y.* 269, is inapplicable, for the reason

stated in The People v. The City Bank of Rochester (*supra*), namely, that there was no specific appropriation of a particular fund for the payment of the claim. That fact was lacking in that case; it is proven here.

The case of Willett v. Stringer, 17 *Abb. Pr.* 152, cited in support of the referee's conclusion, is a Special Term decision by Judge HOFFMAN. The quotation in counsel's brief is a headnote and the headnote is misleading. What the court decided there was that the moneys secured by the mortgage in question must be deemed to have been the trustee's individually; that it was impossible upon the evidence in the case to trace the trust moneys into the securities in question. That was not a case between the cestui que trust and creditors, but between the trustee himself and creditors; and besides, the court found that the creation of the trust was suspicious.

In the case of School Trustees against Erwin, 25 *Ill.* 73, the important fact appears that all money found in the bank at the death of Erwin, the trustee, was $715; $275 of which was identified as part of the trust funds, while the balance was less than the amount of the school trustees' deposit. It was thus established that the banker must have converted the money—into what, or where, could not be proven. The criticism above, in the case of The People against the City Bank of Rochester, also applies here. There was no specific appropriation of a particular fund for the payment of the claim.

General creditors are not injured by this disposition of the matter. They were not doing business with the decedent on the strength of money deposited with

him as margins. Such deposits formed no part of his capital. His credit was in no way based upon the extent of those margins.

The testimony taken before the referee rested chiefly to the claim of Fitzpatrick & Bro. So far as the other customers of deceased who claim a preference are concerned, agreed statements of facts were submitted.

Dobbins & Dazy's claim for preference should not be allowed. The proof I deem insufficient.

George W. Casper is entitled to the original deposit, but not to profits, the proof not showing they constituted a trust fund.

John W. Tullis & Co. are not entitled to a preference. The proof is insufficient. Certain correspondence is mentioned in connection with the agreed statement of facts; but it is not returned with the testimony.

ORANGE COUNTY.—HON. ROSWELL C. COLEMAN, SURROGATE.—February, 1890.

MATTER OF BROOKS.

In the matter of the judicial settlement of the account of CHARLES M. THOMPSON, *as executor of the will of* BENJAMIN F. BROOKS, *deceased.*

A testator gave a specified sum to his executors in trust for his nephew to "be so managed and used as will best promote the future welfare, com-

fort and happiness of the said" nephew, and for that purpose left "the disposition and management of the said sum, both interest and principal, should it be necessary, to the better judgment and discretion of" his executor. *Held:* That the legacy vested in the nephew at the death of the testator, subject only to the control of the executor during the life of the nephew, and at his death passed to his legal representatives and not to the residuary legatees of testator.

Legacies given in lieu of dower, even though they be many times the actual value of the dower right released, do not abate if the estate is insufficient to pay all legacies in full.

ACCOUNTING of Charles M. Thompson, as executor of the will of Benjamin F. Brooks deceased.

The facts appear in the opinion of the Surrogate.

J. W. GOTT, *for* CHARLES M. THOMPSON, *executor.*

J. W. BARTRAM, *for* CELIA A. BROOKS, *legatee.*

THE SURROGATE.—The testator provided in his will as follows: "First. I give and devise to my wife Celia Ann, $2,500 in lieu of dower. Also, I give and devise to my executors hereinafter named, $2,000, in trust, for my nephew Ellsworth Mather. And it is my will that this sum shall be so managed and used as will best promote the future welfare, comfort and happiness of the said Ellsworth Mather, and to that end I shall leave the disposition and management of the said sum, both interest and principal, should it be necessary, to the better judgment and discretion of my executor hereinafter named. . . . . All the rest and residue of my real and personal estate whatsoever and wheresoever and which has not hereinbefore been disposed of, after paying my debts, legacies, and funeral expenses I give . . . . . to my two nieces." . . . .

The estate is insufficient to pay the legacies in full.

The legacy to the widow is conceded to be in value many times the actual value of the dower right released, and it is claimed that the excess in value should ratably abate with the other legacies. The principle is well established that legacies given in lieu of dower do not abate, and while I do not find any case in which it is stated that it makes no difference whether the legacy exceeds in amount the value of the dower right relinquished, I do find several cases in which it was stated that such was the fact and no significance apparently was attached to it. Orton v. Orton, 3 *Abb. App. Dec.* 411.

The testator died July 11, 1888, and his nephew has since died, having received only $174.50 on account of the said legacy.

The question now arises, who takes the principal of the legacy—the representatives of the deceased nephew or the residuary legatees? In Roper on Legacies, at page 640, several instances are given where executors were directed to purchase annuities, for legatees during life, and the legatee died soon after the testator, and before the money had been invested in the annuities, where it was held that the fund vested in legatee at the death of the testator, and passed to the representatives of the legatee; and at page 647, other cases in which legacies were given to trustees in trust to apply the produce to the maintenance during minority and then to settle the same upon the legatee or his issue in the discretion of the trustee, the legatee having obtained majority but dying before settlement made, was held to have become absolutely

entitled upon his death, so as to be able to bequeath the fund by his will.

These cases differ from the present in that in those cases to have carried out the directions of the testator would have completely taken away from the residue the amount of the legacy and the testator clearly so intended. Here such intention is not so plain; the gift is $2,000 in trust to the executors "for my nephew." The trust is the disposition and management "of the sum" principal and interest, if necessary, for the nephew's best interests. In their discretion, they might have paid out to or for him the whole income and fund and, I think, could have invested the whole fund in annuities payable during his life.

The case of Campbell v. Brownrigg, 1 *Phil. Ch.* 301, it seems to me, is an authority in this case. The testator bequeathed 50,000 *sicca rupees* to his daughter for her use in the following manner: to be invested in government securities, interest to be paid to her during her lifetime, and if she married and had children, such children to take the principal. The remainder of his property he gave between three legatees.

The daughter survived the testator and was married, but had no children. The question arose, whether the fund belonged to the personal representative of the daughter or to the residuary legatees. The chancellor, overruling the decision of the vice-chancellor, held that the use only was controlled, and that the daughter took subject to that restriction, and when it ceased it remained by virtue of the gift her absolute property. In Hone's executors v. Van

Schaick, 20 *Wend.* 564, legacies were given not to be paid without the written approbation of the parents, who were to fix a discreet, and proper time for the payment, and it was held that the legatees took a vested interest immediately on the death of the testator.

I have been unable to find in the reports of this state any authority which settles the law of this case, but upon the authority of Campbell v. Brownrigg, *supra*, and our statute relating to uses, I conclude that the legacy to Ellsworth Mather vested in him at the death of his uncle, the testator, subject only to the control of the executor during the life of said Ellsworth, and at his death passed to his legal representatives and not to the residuary legatees of the testator.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—January, 1890.

MATTER OF CONKLIN.

In the matter of the judicial settlement of the account of MARY LEDDY, *executrix of the last will and testament of* ELLEN CONKLIN, *deceased.*

Sometime before her death, decedent gave to one *F.* an order on a Savings Bank for a specified sum, to be expended by him so far as the same might be necessary to meet the expenses attending her death, to pay funeral expenses, and for enclosing her burial plot and for a suitable headstone; and balance which remained he was to dispose of as he pleased. *F.* expended the larger portion of the sum for the purposes

indicated, but made no claim to the remainder, and was willing to pay over the same to the executrix of decedent. *Held;* that this was a valid trust and that the executrix upon an accounting could not be charged with the sums paid out by *F*, the trustee, but that she was accountable for the balance in his hands and which he was willing to pay over.

ACCOUNTING of Mary Leddy executrix of the last will of Ellen Conklin, deceased.

The facts appear in the opinion of the Surrogate

ROBERT O'BYRNE, *for the executrix.*

BOORDEM, HAMILTON & BECKETT, *for* MARY A. WALSH, *contestant.*

THE SURROGATE.—The report of the referee is confirmed, except as appears to the contrary in the following:

In May, 1888, the decedent, upon the suggestion of her husband and Monsignor Farley, gave the latter an order on the savings bank for $1,000, to be expended by him to meet the expenses attending her death; to pay funeral expenses, and for enclosing her burial plot, and for a suitable headstone.

In pursuance of this direction, the sum of $1,000 was drawn from the bank, and subsequently the interest on that amount, $17.50.

The decedent told Monsignor Farley that if any balance remained he could do with it as he pleased.

Forty-five dollars were expended by him before her death and the following payments made by him thereafter: For funeral expenses, $10: to Rohan Bros. for tablet and lettering and inclosing plot and sodding same, $664.44; to Thomas Boylston, funeral expenses, $214.50, and $10 to a clergyman to say masses.

The executrix admits that she never made any ef-

fort to collect this part of the estate and that she did not authorize the expenditures.

The referee has charged the account of the executrix with the sums paid out by Monsignor Farley since decedent's death. This is error.

The trust created in the lifetime of the decedent was undoubtedly valid. As was said in Gilman v. McArdle, 99 *N. Y.* 460, "there certainly can be no legal objection to a person contracting in his lifetime for his funeral, his coffin and his monument . . . . . and paying for them in advance; and if so, what reason can there be for denying him the power of paying a sum of money to a third person on his agreement to procure those things."

In the case at bar the intention of the testatrix was, that upon the agreement of Monsignor Farley to carry out her wishes regarding her funeral and burial plot, &c., he should receive $1,000 and expend the entire sum if necessary.

If this had not been her intention she would not have said that he could do what he pleased with any balance there might be, but, on the contrary, would have restricted the expenditures and directed him to draw a lesser sum from the bank. It is evident she contemplated the application of the entire amount, if necessary, in the trustee's discretion.

In view of the fact that Monsignor Farley lays no claim to the unexpended balance, and is willing to turn it over, I think it is the duty of the executrix to make it an asset of the estate, and her account should be charged with the amount. The executrix should be charged with the amount received by her as exec-

utrix, but credited, however, with the amount of the legacies paid by her, as the same must be abated in consequence of the insufficiency of the estate to pay the same in full.

The conduct of the executrix is reprehensible. The language used by the Surrogate in the Matter of Harnett, 15 *St. Rep.* 725, is applicable to this case, and will be incorporated and become a part of the decision: "The executrix has been grossly delinquent in her administration of this estate. There has been no pretence on her part or behalf of compliance with the plainest requirements of the statute. . . . . It is clear, on the evidence, that she is an ignorant woman, and has been absolutely dependent upon her attorney for advice and direction in regard to the most simple details of her duties as executrix. . . . . In cases such as this it is the duty of the Court to vigorously condemn such palpable negligence, and to visit upon the delinquent such reproof and penalty as the wholesale administration of justice and the rights of those to whom the estate belongs demands."

In this case the executrix ought not to be allowed any commissions, and the entire cost of this proceeding should be charged against her personally.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—January, 1890.

MATTER OF DWIGHT.

In the matter of the judicial settlement of the account of FREDERICK A. DWIGHT *and* JAMES D. PLATT, *executors of the will of* AMOS T. DWIGHT, *deceased.*

A proceeding for an accounting commenced upon the Surrogate's own motion is an intermediate account and when filed it should be in such shape that it may be settled in a proceeding to be instituted under § 2729 of the Code of Civil Procedure.

Such intermediate account should state if an inventory has been filed, or if not, the account itself should furnish the information usually thus supplied. It should likewise state fully all the matters as to advertisements for claims, what claims have been presented, allowed or rejected, and the time and manner thereof and the reason for allowance or rejection. The account should also contain the funeral charges and expenses of administration, moneys paid to creditors, legatees and next of kin. It should also state the age of the legatees and next of kin, and if any of them are minors; if so, the names and residences of their guardians. The accounting party is bound also to state any other fact which has occurred as part of his proceedings which may affect the estate, or the rights of any distributee, or his own rights. And he must produce vouchers for each payment, or if such payments were under twenty dollars, in lieu of a voucher his own oath as to the fact of payment, when made, and to whom.

The order of the Surrogate made upon his own motion for an accounting may be answered by the representative of the decedent filing with the court the releases duly acknowledged of all the parties interested in the distribution of the fund either as legatees or next of kin. In the case of the death of such legatees or next of kin similar releases should be obtained from their personal representatives.

ACCOUNTING by executors under an order of the Surrogate.

The facts appear in the opinion of the Surrogate.

ALEXANDER & GREEN, *for executors.*

SCOTT LORD, *special guardian of* SUSAN D. BLISS, *an infant.*

THE SURROGATE.—This is a proceeding commenced upon the Surrogate's motion.

In response thereto, what professes to be an intermediate account of the proceedings of the executors has been filed. The estate is a large one, the property purporting to be accounted for amounting to nearly $600,000.

The account filed sets forth in detail the cash and personal property which came into the hands of the executors, and purports to account for the disposition made of the money, together with the personal securities.

No vouchers are filed for the payments alleged to have been made, nor are receipts or releases filed from the legatees or from annuitants.

Executors and administrators, and more particularly counsel having in charge the filing of answers or accounts in response to proceedings of this character, seem to be under a grave misapprehension as to the scope of the proceeding and the character of the account to be rendered. I have, therefore, considered it advisable to take advantage of this opportunity of reminding such officers of the law upon the subject, in order that I may not be required in each individual case arising in the future, to criticise the accounts filed.

The account required by the order of the Surrogate is an intermediate account; when filed it should be in

such shape that it may be settled in a proceeding to be instituted under section 2729 of the Code of Civil Procedure. (See 6 *Dem.*, 506.)

The account should state if an inventory has been filed; and if none has been filed, the account itself should furnish the information usually thus supplied. It should likewise state whether or not advertisements for claims have been published, what claims have been presented, what allowed, and what rejected; and the time and manner in which they were rejected or disputed, and the reason therefor. Also, what claims have been presented and allowed since the expiration of the publication of the advertisement for claims. The accountant should then proceed to credit himself with funeral charges and expenses of administration, with moneys paid to creditors, naming them, and payments to legatees or next of kin. He should state the age of legatees and next of kin, if any are minors, and whether they have guardians, and, if so, their names and places of residence, and how appointed. If there is any other fact which has occurred as part of his proceedings, which may affect the estate or the rights of any distributee or his own rights, he is bound to state it. He must not only state in what character his payments were made, whether to creditors, legatees or next of kin or for expenses for funeral charges or of administration distinctly, but he must produce vouchers supporting each payment; or, in cases of claims under twenty dollars where no voucher is produced, he must make and present, in lieu of voucher, his own oath positively to the fact of payment, when made, and to whom. Unless the order of the Surro-

gate, requiring an executor or administrator to render an account of his proceedings, is obeyed in this manner, as plainly indicated by the statute, he will not have made the proper response to the order.

"The mandate is judicial and peremptory as to him to render an account of his proceedings, not to the extent he shall deem proper, nor a part of his proceedings, but his proceedings as executor from the day he qualified until the day he answers the order." Matter of Jones, 1 *Redf.*, 268.

Of course, the order of the Surrogate may be answered by the representative of the decedent filing with the court the releases, duly acknowledged, of all the parties interested in the distribution of the fund, either as legatees or next of kin. Where such legatees or distributees are dead, similar releases should be obtained from their personal representatives.

Unless the account filed is amended within ten days, so as to correspond with the foregoing directions, a reference will be ordered.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—January, 1890.

MATTER OF CLARK.

In the matter of the estate of D. LAWRENCE CLARK, *deceased.*

Under the collateral inheritance tax act as amended in 1887 (Laws 1887, Ch. 713, § 1), money on deposit in this state and a bond secured by a

mortgage on property here belonging to a non-resident decedent, is subject to the tax.

PROCEEDINGS for the collection of the collateral inheritance tax on certain property belonging to D. Lawrence Clark, deceased.

The facts appear in the opinion.

JOHN MACDONALD, *for* WILLIAM I. CLARK, *executor.*

BENJ. F. DOS FASSOS, *Assistant District Attorney, for the comptroller.*

THE SURROGATE.—Decedent was a non-resident of this state, but left both real and personal property herein.

Counsel for the executor claims that the personal property, consisting of two bank accounts and a bond secured by mortgage on real estate within this county, is exempt because personal property follows the situs of the owner, and this personal property is intangible here.

Section 1 of chapter 713, Laws of 1887, reads as follows: "After the passage of this act all property which shall pass by will . . . . . or if such decedent was not a resident of this state at the time of death, which property or any part thereof shall be within this state . . . . . shall be and is subject to a tax of five dollars on every hundred dollars."

In the Matter of Enston, 113 *N. Y.* 174, the Court of Appeals, while holding that under the act of 1885, the property of a non-resident decedent was not subject to this tax, says: "By chapter 713 of the Laws of 1887, section 1 of the act of 1885 was so amended as to subject to its operation the property within this state of a non-resident decedent. . . . ."

In a recent case, State v. Dalrymple, 70 *Md.* 594, this question is discussed fully.

The Maryland statute says: "All estates, real, personal and mixed, money, public or private securities for money of every kind, passing from any person who may die seized and possessed thereof, being in this state . . . . ." and the Court of Appeals held that "being in this state" refers to the actual situation of the property and not to the constructive situation. The fact that the decedent was a non-resident did not affect the question.

Judge McSherry, in delivering the opinion of the court, says: "The tax, we have said, is on the transmission of the property 'being in the state,' and no reason has been assigned or can be suggested why the broad language of statute and the evident design of the legislature should be so narrowed and restricted as to exempt from this tax the property of a non-resident actually here, notwithstanding that same property may, for other purposes, be treated as constructively elsewhere. If we adopt the view insisted on by the appellees, it would result in a discrimination in favor of the non-resident, and against our own citizens—a discrimination, too, which the legislature certainly never intended to make, and for which no warrant whatever can be found in the plain letter of the statute. In permitting property within the state, upon the death of its owner, to pass by devise, or descent, or distribution, the legislature has seen fit, where strangers or collateral kindred receive it, to exact as the condition upon which that privilege is granted, the tax in question. The imposition and

collection of the tax cannot, therefore, depend upon the mere accidental residence of the owner."

In the case of San Francisco v. Mackey, 22 *Fed. Rep.* 601, cited by counsel for the executor, Judge SWAYNE held "that shares of stock in a corporation are intangible property, the situs of which follows that of the owner, and are tangible where the owner is tangible." Such shares of stock are simply evidences of indebtedness not by any person or corporation within the commonwealth, and such a case is easily distinguishable from the case at bar.

In this case the personal property consists of money on deposit, and a bond secured by a mortgage on property here, and in any question arising out of these deposits or this bond, the aid of the courts of this state must be invoked. This property has enjoyed the protection afforded by the laws of this state, and must pay, as the condition upon which the privilege of allowing it to pass is granted, the tax imposed by the law.

Submit order confirming the report of the appraiser and assessing and fixing the tax.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—January, 1890.

MATTER OF TOPPING.

In the matter of the estate of HENRY FOSTER TOPPING, *deceased.*

Upon an application for permission to sell real estate to pay the debts of the decedent, a grantee of an heir can show in opposition thereto that there were other assets besides those contained in the inventory available for the payment of the decedent's debts, though the inventory was filed by the heir who was his grantor.

While ordinarily before a direction is given for the sale of real estate to pay the debts of a decedent, all the personal property of decedent should be applied, to the payment of such debts, yet the court can direct a sale in a proper case where all the personal property has not been so applied or where a part of the debts consists of demands which are doubtful or in litigation. But reasonable diligence to effect the conversion of the assets into money and their application to the payment of the debts is necessary in such case.

Where it is shown that the administratrix who applies for permission to sell the real estate of decedent for such purpose has made no attempt to collect the proceeds of a sale of some of the decedent's personal property by a former administrator, it not being shown that such an attempt would have been futile, reasonable diligence is not exercised by the administratrix, and her application to sell the real estate will be denied.

A Surrogate obtains jurisdiction to order a sale of the real estate of a decedent for the payment of debts if a petition is filed therefor within three years from the granting of letters of administration, although the citation is not returnable until after such period.

MOTION to confirm the report of a referee in proceedings to sell real estate belonging to the estate of Henry Foster Topping deceased, for the payment of debts.

The facts appear in the opinion.

MATTER OF TOPPING.

R. H. UNDERHILL, *for petitioner.*

DANIEL FINN, *for contestant.*

THE SURROGATE.—The present is an application by the administratrix of the decedent for the sale of his real estate for the payment of his debts. The grantee of decedent's heir contests the application. The referee to whom the issues were referred has filed his report. The petitioner excepts to the admission by the referee, against her objection, of certain evidence adduced to show the existence of assets in addition to those mentioned in the inventory, which came to the hands of the administrator whom petitioner succeeded. Such administrator was the only heir of the decedent, and was the grantor of the real estate in question. The contestant is the grantee. The latter has filed exceptions to the findings of the referee. These involve the following questions:

First—Whether the referee was right in finding that the debts mentioned in his first finding were established as debts against decedent's estate;

Second—Whether there was sufficient personal estate available for their payment.

The evidence whose admission is the subject of the administratrix's exception, was properly received. It was entirely competent for the contestant to show that there were other assets besides those contained in the inventory available for the payment of the debts sought to be collected from his property, despite the fact that the inventory was filed by his grantor.

The exception of the contestant with respect to the holding of the referee in his first conclusion of law as

to the debts established against the estate, is overruled. The evidence sustains the conclusion. The referee finds and the evidence shows, that in addition to the property inventoried there was certain other personal property left by the decedent which was sold by the former administrator for $646. There is nothing to show that this amount was ever applied to the payment of decedent's debts, or that diligent effort was made to collect it or effect such application. For aught that appears it is readily collectible. Certain stock which was inventoried as valueless was sold by the former administrator for $1,500. Of this $250 were, it seems, allowed as a commission upon the sale, and $950 paid to the attorney of the administrator for collecting certain notes received as the purchase price of the stock and for rendering other services of a trifling character to the administrator. It is not entirely clear from the evidence that this payment to the attorney was not in part for other services than those performed for him as administrator.

Ordinarily, it is necessary, before a direction is given for a sale such as is sought to be effected here, that all the personal estate should be first applied to the payment of the debts. Corwin v. Merritt, 3 *Barb.* 346; Moore v. Moore, 14 *Barb.* 29–30; Forbes v. Halsey, 26 *N. Y.* 64; Tucker v. Tucker, 4 *Abb. App. Dec.* 433–4.

It is, however, entirely competent for the court in a proper case to direct a sale where all the personal property has not been so applied, or where a part of the debts consists of demands which are doubtful or are in litigation. But reasonable diligence to effect

the conversion of the assets into money, and their application to the payment of the debts, is, in such case, necessary. Farrington v. King, 1 *Bradf.* 185; Skidmore v. Romaine, 2 *Bradf.* 122; Moore v. Moore, 14 *Barb.* 29–30; Bridge v. Swain, 3 *Redf.* 490; Code of Civil Procedure, section 2759, subd. 5.

I am not satisfied, upon the evidence submitted, that such diligence has been exhibited by the administratrix. Unless the petitioner can show that an attempt to collect from her predecessor any of the assets for which he is liable, would be futile, the attempt to recover such assets should be made before an order directing the sale of the real estate should be granted.

This matter may, if petitioner elect, be referred back to the referee for proof as to the petitioner's ability to collect the assets, and as to such efforts as she may have already made for the purpose. In case she should not so elect, an accounting to establish the liability of the former administrator to the estate and the ability of the petitioner to realize upon it will be necessary. In case the course last indicated is adopted, this application will be suspended to await the result. The conclusion which I have reached necessitates the overruling of the referee's second and third conclusions of law.

It is claimed that this proceeding was not commenced within three years since the granting of letters of administration to the former administrator, and that therefore the court was without jurisdiction to entertain it. The letters were issued November 23, 1885. The petition was filed herein November 21st, 1888. The citation, although returnable after the

lapse of three years since the issuance of the letters, was issued at the same time the petition was filed. The petition having been filed within the three years, the court acquired jurisdiction of the proceeding. (Section 2750 Code Civil Procedure; Matter of Gouraud, 95 *N. Y.* 256; Matter of Phalen, 51 *Hun* 208.

CHAUTAUQUA COUNTY.—HON. DANIEL SHERMAN, SURROGATE.—February, 1890.

MATTER OF ROLPH.

In the matter of the judicial settlement of the account of JANE E. ROLPH *as administratrix of* WORTHY M. ROLPH.

Where an administratrix, the widow of decedent, and also appointed general guardian of his and her children has applied the personal estate partly to some necessary repairs to the dwelling-house of decedent commenced by him before his decease, and necessary to make the house tenantable for herself and the minor children of decedent, and partly in good faith to the payment of incumbrances, taxes and insurance on the real estate which payments were necessary for the preservation of the property of the estate and beneficial to the minors her wards who lived with and were maintained by her, such payments will be allowed upon an accounting by her as such administratrix.

ACCOUNTING by Jane E. Rolph as administratrix of Worthy M. Rolph, deceased.

The facts appear in the opinion of the Surrogate.

H. C. KINGSBURY, *for the administratrix.*

VAN DUZEN & MARTIN, *for contestants.*

MATTER OF ROLPH.

THE SURROGATE.—The deceased died, intestate, August 12, 1880, leaving, him surviving, Jane E. Rolph, his widow, now Williams, and four minor children, of the ages of thirteen, ten, and seven years, and the youngest seven months. He owned at the time of his death a farm of 51 acres in the town of Stockton, of the estimated value of about $1,200, and personal property of the value of about $500, and besides having insurance on his life of about $2,000, payable to his estate. The widow was appointed administratrix on August 21, 1880, nine days after the decease of her husband, and collected such insurance, and took possession of the personal property, and an inventory was duly made and filed, September 13th of the same year, showing the value of personal property, including such insurance, at about $2,567, and including the widow's statutory exemption of $150 set off to her therein. The said widow and administratrix was duly appointed guardian of the persons and property of her four minor children, November 15, 1880, and duly qualified, and has not been discharged. During several weeks prior to his death, the deceased had been purchasing lumber and materials, and making necessary repairs on the small dwelling-house on the farm where he and his family lived. He had employed mechanics and workmen in making such repairs, and owed them therefor, and for such materials, about $160. The deceased was suddenly killed, by an accident, when at work on his farm, and when his corpse was taken to the house, on the day of his death, the principal rooms in the house were filled with lumber and materials for such repairs, and rubbish, which his

neighbors removed. There was then a mortgage on the farm, executed by the deceased, in his lifetime, to one Goodrich, on which there was due about $700. After the death and burial of her husband, the widow completed the repairs upon the house, according to his previous plans, at an additional expense of about $160. I find that such repairs were necessary for the preservation of the property, and to make the house tenantable for her and her children.

The widow, Mrs. Rolph, was married to one Williams on January 24, 1881, and had by him a child, which thereafter lived with her in the house on the farm until March, 1888; he assisting her in carrying it on, and in the support of her children, and she assisting in the care and support of his child. Mrs. Williams, after her appointment as administratrix and guardian for her children, paid the amount due upon the mortgage, being $712.65, and paid taxes on the farm from year to year until 1888, $66.75, and insurance, $19.75, stated in the account herein, and also paid for such necessary repairs, as I find, in amount $320, making in all $1,119.15, which she paid from the personal property of the estate; all of which, I find, were necessary for the protection and preservation of the property of the estate, and especially so for the interest of her said four minor children, who lived with, and were educated and supported by her on the farm, until March, 1888. It should be borne in mind that this widow, in making such payment for the benefit of her minor children, and against her own interest, would otherwise have been entitled, on settlement of her accounts as administratrix, to the

distributive share of one third of said $1,119.15, which, with interest from the time of accounting, hereinafter mentioned, on March 20, 1882, before the then Surrogate, would amount to about $500. It appears that the administratrix, on March 20, 1882, went personally and alone to the office of the Surrogate of Chautauqua county, and there made petition and her account, drawn by one of his clerks, on settlement of her accounts as administratrix, and on that day such Surrogate, without the service of any citation upon her minor children, and without any special guardian being appointed to protect their rights, made a decree substantially allowing the several items above named, paid by her for taxes, repairs, insurance, and upon said mortgage, and, after allowing her for payment of other debts of the deceased, and funeral expenses and expenses of administration, found remaining in her hands from the personal property of the estate the sum of $120.69 only.

Petition was recently made by one of her daughters, now married, of the age of 20 years, for an accounting herein by the administratrix, and to set aside such former accounting as irregular and void, on the grounds that no notice was served upon the children, and no special guardian was appointed for them, and for other alleged errors; and, upon service of a citation issued upon such petition, the administratrix appeared, and filed her petition for an accounting, and all parties interested were duly served with citations, and upon the return-day thereof a special guardian was appointed for such of the heirs as were minors, and all parties interested appeared, and con-

sented that such accounting before said former Surrogate should be opened, and the same was opened and set aside; and thereupon said administratrix filed her account, and the said contestants objected to the above-named items upon the grounds that the administratrix had no legal right to pay same from the personal property of the estate, for the benefit of the real estate, and that the Surrogate's Court had no jurisdiction to allow them. It was claimed on the part of the administratrix, the petitioner, that she was general guardian of said minor children at the time such payments were made, and that she paid same as such guardian. I am strongly of the opinion that the disputed items should be credited to the administratrix in this very exceptional case, under the authority of the Surrogate to settle estates and make distribution. The strongest claims of equity and justice would seem to require that statutes passed to protect estates and the rights of the widow and the minors should not be so construed as to wreck estates, or do injustice to any one. There is no doubt but the administratrix acted in perfect good faith in all she has done, acting under the approval of the Surrogate, to whom she applied for direction and advice. The learned counsel for the contestants strongly contend that the administratrix, although being guardian for her minor children, had no legal right to pay these disputed claims from the personal property of the estate, and that the Surrogate's Court has no jurisdiction to allow them to her in this accounting; that to do so would be an attempt to settle the account in this proceeding as between the guardian and her wards, and would be void for

want of jurisdiction; and cite the following authorities to sustain their position. 1 Rev. Stat. (8th. ed., p. 2461), p. 749, § 4; Cornwell v. Deck, 2 *Redf.* 87; Wilcox v. Smith, 26 *Barb.* 316; Diaper v. Anderson, 37 *Barb.* 168; Code of Civil Procedure, § 2847; Matter of Hawley, 104 *N. Y.* 250; Ferrin v. Myrick, 41 *N. Y.* 315; Schmittler v. Simon, 101 *N. Y.* 554; Delaware L. & W. R. R. Co. v. Gilbert, 44 *Hun* 204. I am of the opinion, from a careful examination of these authorities, that, while they confirm the long-established rule that, generally, an administrator has nothing to do with the real estate of the intestate, yet they do not appear to dispose of the real issue involved in this accounting, under the exceptional state of facts disclosed by the evidence herein. In no one of the cases cited was the administrator, while making repairs, paying taxes, and mortgages upon the real estate of the deceased, at the same time acting as general guardian of his wards, being the sole heirs at law of the intestate. This is not an attempt to settle accounts as between the guardian and her wards, over which the Surrogate's Court could not entertain jurisdiction, as was the case in Banks v. Taylor, 10 *Abb.* 199. The case of Shepard v. Stebbins, 48 *Hun* 247, (decided by the General Term of the Supreme Court, Fourth Department, in 1888,) appears to be squarely in point, the facts in which case are very similar to those in this proceeding; and the conclusions of law, as stated in the opinion of the court, written by MARTIN, J., conserve equity and justice, and are clearly set forth in the head-note of the case, as follows: "Where an administrator, who is also a general guar-

dian of the children of an intestate, with the approval and consent of the other general guardians of the children, in perfect good faith, and with the honest and earnest purpose of promoting the welfare, comfort, and best interest of their wards, and of their estate, determines to keep the family of children together upon the homestead farm of the intestate, and expends certain sums of money received by him as administrator in the payment of taxes on the farm, and for material and labor employed in the care of, and in making repairs to, the real estate, and in the support and education of the children, and the expenditures so made are such that, if permission had been asked of the court to make the same, such authority would have been given, the acts of the administrator and guardian in thus expending the money belonging to the estate of the intestate will be approved, and his accounts will be allowed and passed by the court. The claim for the support and maintenance of the family of the testator should not be disallowed because a separate account was not kept of such expenditures made for each of the infant children, as such an account will be quite impossible where the children are all given a common home, and the necessaries for all are supplied from one common fund." The conclusions reached by the Supreme Court in the above case are well sustained by the following authorities: 2 Rev. Stat. (8th ed., p. 2613), p. 152, § 20; 2 Perry on Trusts, § 607; Torry v. Black, 58 *N. Y.* 185; Emerson v. Spicer, 46 *N. Y.* 596; White v. Parker, 8 *Barb.* 52; Copley v. O'Neil, 39 *How. Pr.* 41; Hyland v. Baxter, 98 *N. Y.* 610; Haight v. Brisbin, 100 *N.*

Y. 222; and by other cases cited in opinion in Shepard v. Stebbins. I direct a decree allowing the account of the administratrix as presented and filed, except as to the item of $100 for money lent, not proved, and allowing claim for $385 for repairs at $320, costs to be paid out of the estate.

ORANGE COUNTY.—HON. ROSWELL C. COLEMAN, SURROGATE—February, 1890.

MATTER OF ROGERS.

In the matter of the estate of JOHN L. ROGERS, *deceased.*

A bequest in a will in payment of a debt, and not as a gift, is not subject to the collateral inheritance tax.

Under this rule where testator in his will gave and bequeathed to a creditor for whose security testator had effected insurance on his life "any and all benefits so far as his interests may appear and be proved" in his membership in a mutual aid association such bequest was not subject to the collateral inheritance tax because the creditor and legatee took only to the extent of such debts as he could prove against the estate.

PROCEEDINGS for the collection of the collateral inheritance tax on the estate of John L. Rogers, deceased.

D. A SCOTT, *for* MARY E. ROGERS, *widow.*

THEODORE MILLER, *for* JOHN B. HILLYER.

THE SURROGATE.—By an instrument which has been

admitted to probate as the will of John L. Rogers, who died a resident of this county, October 12, 1889, it is provided as follows:

"I hereby give and bequeath to J. B. Hillyer of 74 Broadway, New York City, any and all benefit so far as his interest may appear and be proved. The balance and remainder to my wife . . . . . and any and all benefit and moneys which may accrue or become due and payable at my decease under and by virtue of my membership in the Northwestern Masonic Aid Association of Chicago."

It appears that the testator in order to secure an indebtedness to J. B. Hillyer effected an insurance upon his life with the Masonic Aid Association, and there is now due Hillyer upon this indebtedness $5,163.39, as ascertained and reported by the appraiser appointed under chapter 713 of the laws of 1887. It is claimed that this sum is not liable to the tax imposed by the act mentioned; that it is not a gift, legacy or inheritance within the meaning of that act.

The act is entitled "An act to tax gifts, legacies and collateral inheritances," and the property made subject to tax by section 1 is, all property which shall pass by will, or by the intestate laws of this state from any person who may die seized or possessed of the same.

It does not appear to whom the insurance would have been payable, if there had been no will, and I do not suppose that is material in this proceeding, for, if the will had not contained the provision in favor of Hillyer, the wife would have taken it all under the will, and the fund therefore would not be taxable.

Whether Hillyer takes anything under the will depends upon his being able to prove a debt. He takes nothing if there was no debt. So that while he may be entitled to receive something by virtue of the will, he does not get it as a gift but as payment of a debt. It may be that unless he had been provided for in this way by the will, Hillyer would not have been able to collect his debt, by reason of the terms of the contract of insurance; still, as I have said, whatever he may get, even by virtue of the will, is simply the payment of his debt. The words "give and bequeath" are employed by the testator, but I do not think that thereby any added force or character was given Hillyer's claim, and the use of them accomplished nothing more than the usual general direction in wills to pay debts and funeral expenses.

I am therefore of opinion that the money received by Hillyer is not a gift, legacy or inheritance, or property which has passed by will from a person who has died seized or possessed of the same.

A bequest in satisfaction of a debt has been held to be within the definition of a legacy. Orton v. Orton, 3 *Abb. App. Dec.* 411, 414, but I doubt if the word "legacy" is used in so broad a sense in this act. A legacy naturally implies bounty or benevolence. Lockyer v. Simpson, *Mosely*, 300; Clark v. Sewell, 3 *Atk.* 98; and it has been held that so far as a legacy is applied to pay a debt it is no legacy but is a payment, and not a gift. Rawlins v. Powell, 1 *P. Wm.* 299; Cuthbert v. Peacock, 1 *Salk.* 155.

Having reached this conclusion, it is not necessary to consider whether under the circumstances, the

money being received as a benefit from an aid association after death of a member it can properly be considered property that has passed "from a person who may die seized or possessed of the same," which I am inclined very much to doubt.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—March, 1890.

MATTER OF PECK.

In the matter of the estate of SARAH E. PECK, *deceased.*

A legacy of five hundred dollars payable at the end of a year from the date of the letters testamentary is not subject to the collateral inheritance tax.

THE deceased, by her will, bequeathed $500 to the Board of Home Missions of the Presbyterian Church in the United States of America, and $500 to the Board of Foreign Missions of the same church, and the question has been presented as to whether these legacies are subject to taxation, by reason of their amounts, under the Collateral Inheritance act. Other questions are also submitted.

F. B. CHEDSEY, *for* THOMAS B. PECK, *executor.*

JOHN E. PARSONS, *for Board of Home Missions.*

THE SURROGATE.—The first question to be consid-

ered is whether the bequests of $500 are subject to the tax. By the first section of the act (chap. 713, Laws of 1887), it is provided that the estate bequeathed to any person or corporation, not exempt, "shall be and is subject to a tax of five dollars on every hundred dollars of the clear market value of such property, ... provided that an estate which may be valued at a less sum than five hundred dollars shall not be subject to such duty or tax." By the fourth section the tax is made due and payable at the death of the decedent. By the thirteenth section the appraiser is required to appraise such property so bequeathed, at its fair and market value, and on his report the Surrogate must assess and fix the then cash value of the same.

Now, it has been finally settled, after many conflicting decisions, by the case of Thorn v. Garner, 113 *N. Y.* 198, that a legacy, not sooner payable, and not given for support, will draw interest only from a year after the date of the letters testamentary. It certainly seems very clear that such legacies as are here bequeathed, payable at the end of one year, are not of the fair market or cash value of $500 each. No business man would so regard them. Each would be of the value of the amount, less the interest until payable. Suppose a testator were to bequeath the same sum to a person not exempted from the tax, payable at the end of five years from decedent's death, it certainly would not, for the purposes of taxation, be assessed at a market or cash value of $500.

One of the learned counsel has aptly likened the case to that of a promissory note, made payable one

year from date. Its cash value would be the amount, less interest, say, $475. There is now pending before me a will wherein a bequest of $2,500 is made to a person whose legacy is subject to the tax, payable in four equal semi-annual installments, the first payment to be made six months after the death of the testator. It is perfectly apparent that the clear market value of the legacy is less than $2,500.

The proposition seems too plain for argument. It must, therefore, be held that the legacies in question are not subject to taxation under the act, and it would thus appear that the view expressed in the Matter of Jones, 5 *Dem.* 30, to the effect that cash legacies require no appraisal, needs some modification.

Jared V. Peck, a brother of the testatrix, was bequeathed the income for life of a sum amounting to about $33,000. At his death it is given, in taxable shares, to persons whose interests are subject to the tax. The questions are presented as to whether the tax on these shares shall be paid out of the principal fund, or by the legatees in remainder on their failure to give bonds as provided by section two, and, if such bonds shall not be given, how can payment be enforced?

The parties in interest do not seem to be before me in such an attitude as to warrant a determination of these questions in such manner as would be binding upon them, or to enable me to make a decree on the subject that could be enforced. When the matters shall be properly presented, doubtless a mode of coercing payment may be found.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—January, 1890.

MATTER OF STERN.

In the matter of the application for revocation of letters testamentary issued under the will of JOSEPH STERN, *deceased.*

One who subsequent to the death of a testator has sold goods to a firm composed of the surviving partner of testator and the executor and executrix, as such, of testator, which business was continued under a provision of the will that the executor could only devote to the purposes of the business so much of the estate as was already at testator's death invested therein, is not a creditor of the estate, and cannot as such apply under section 2685 of the Code of Civil Procedure for revocation of letters testamentary issued to the executors of deceased.

Such creditor has only a remedy so far as the estate of decedent is concerned, against the assets embarked in the business which are simply an investment of the estate and has no claim against the executors and executrix as such.

APPLICATION for the revocation of letters testamentary issued to the executors of Joseph Stern, deceased.

The facts appear in the opinion of the Surrogate.

FRANKLIN BIEN, *for petitioner.*

DANIEL G. ROLLINS, *and* M. W. PLATZEK, *for the executrix.*

THE SURROGATE.—This is an application under section 2685 of the Code for the revocation of letters testamentary. No answering affidavits are filed. The counsel for the respondents interposed an elaborate

brief, however, which must be considered in the nature of a demurrer.

The petitioner applies as a creditor. The nature of his claim will appear by the following facts: By the provisions of the will the executors were authorized to continue the business in which decedent had been engaged during his lifetime. Subsequent to the death of the testator and while the business was being conducted by the firm composed of the surviving partner and the executor and executrix, as such, the petitioner sold goods to the said firm.

Under the decisions a debt accruing under such circumstances can only be collected, so far as the estate of deceased is concerned, from the assets which were in the business. Under the terms of the will the executors could only devote to the purposes of the business so much of the estate as was already at testator's death invested therein. The creditor could not collect his claim from assets not properly embarked in the business. Willis v. Sharp, 113 *N. Y.* 586; Same v. Same, 115 *N. Y.* 396.

A point is made by the respondents that the petitioner has no standing to make the application. In this contention I think they are correct. The only persons under the section who can apply are creditors or persons interested in the estate of decedent. The petitioner is not a person "interested in the estate of decedent," as creditors are expressly excepted by the language of subdivision 11, section 2514, which defines the term "persons interested" where used in the act.

To sustain his right to petition, therefore, he must

be a creditor. The term "creditor" is defined by subdivision 3 of section 2514, which, when paraphrased, will read as follows: A creditor is a person having a claim or demand upon which a judgment for a sum of money could be recovered in an action.

Now, as there can be no doubt that the present petitioner could not recover upon his demand as against any assets of the estate not properly employed by the executors in the business continued subsequent to the death of the testator, but would be confined as to his recovery to such assets, it is clear that he is not a creditor of the estate, for the estate would properly include both. He is simply a creditor as to the fund against which he might recover judgment, which is simply an asset or investment of the estate. This view is emphasized by the consideration that, apart from the authority to continue the business, the debt having accrued subsequent to the death of the decedent, the petitioner would not have been a creditor either of the estate or of the decedent; he would have had a claim only against the executor personally. This is true notwithstanding a court of equity will sometimes, where the executor is shown to be insolvent, permit such a creditor to have the assets of the estate applied to the payment of his claim.

Apply the test suggested by subdivision 3 of section 2514. Could the petitioner recover a judgment for a sum of money against the respondents on its claim? Unless it could, it would not be included in the term "creditor." While it might have recourse to so much of the estate as was properly embarked in

the business, it is clear the suit of the petitioner could not be maintained against the executors as such.

Motion denied.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—February, 1890.

MATTER OF STILLMAN.

In the matter of the application for revocation of the probate of the will of MARY L. STILLMAN, *deceased.*

Where one of the subscribing witnesses to a holographic will testifies to the due execution of the instrument and where the surrounding facts and circumstances tend to support such evidence, the paper will be admitted to probate although the second witness testifies that the will was not duly executed.

PETITION by Howard Crosby, Margaret A. Gaynor, Louise Killett and the Association for Befriending Young Girls for a revocation of the probate of the will of Mary L. Stillman, deceased.

The facts appear in the opinion of the Surrogate.

HERBERT G. HULL, *for the proponent.*

BOORAEM, HAMILTON & BECKETT, *for contestant,* LOUISE KILLETT.

JOSEPH B. OWENS, *for* the Association for Befriending Young Girls.

WALTER EDWARDS, *for* HOWARD CROSBY, *a legatee.*

JOHN J. DELANY, *for* MARGARET A. GAYNOR, *a legatee.*

THE SURROGATE.—The will, except the printed portion, is in the handwriting of the decedent, and as to form, is in all respects a will. No doubt exists as to her capacity to make a will, nor is there any pretence that she was subject to any restraint. It is, however, strenuously argued that the paper was not duly subscribed and published. The argument in support of this view is a strong one, but it cannot prevail. The purpose of our statute being ascertained, no difficulty will be found in the way of a right decision in this proceeding.

The purpose of the statute is to prevent fraud upon the testator, and the first act requiring subscribing witnesses to a will was the Statute of Frauds, 29 Charles II., ch. 3.

The question now under consideration was very soon mooted under this act: Hudson's Case before the Court of King's Bench; Rice v. Oatfield, *Strange*, 1096; Goodtitle v. Clayton, 4 *Burrows* 2224; Windham v. Chetwind, 4 *Burrows* 414; see the illustration of Lord MANSFIELD; Lowe v. Jolliffe, 1 *Wm. Bl.* 365.

Under the English statute of wills, 1837, see Gove v. Gawin, 3 *Curteis* 151; Chambers v. Queen's Proctor, 2 *Id.* 415; Blake v. Knight, 3 *Id.* 549.

The doctrine of these cases has been approved by the courts of this state. Jauncey v. Thorne, 2 *Barb. Ch.* 40.

The Surrogate should be satisfied that the paper propounded was executed in proper form; that is to say, that it was signed by the testator at the end thereof and attested by at least two witnesses; or, if

not signed in their presence, was declared by the testator to be his last will and his signature acknowledged to both witnesses. If it appear to his satisfaction, from proof of all the facts and circumstances surrounding its execution, that the testator knew it was his will, whether such proof is given by the subscribing witnesses or by others, whether by memory of the words spoken by testator or by another or others in his presence and hearing, whether by acts or signs on the testator's part, the paper propounded is entitled to probate. The paper may be admitted, notwithstanding one or both subscribing witnesses flatly deny that it was either subscribed or published in their presence.

The point is, did the testator know that the paper he signed was his will, and did he in any way disclose such knowledge to the subscribing witnesses. The Surrogate is not permitted to rest his decision upon the testimony of the subscribing witnesses. He must inquire into all the facts and circumstances, and if he be satisfied that the paper was duly executed by a competent testator he must admit it to probate.

In the present proceeding the paper itself proves that the testatrix knew when she signed it that it was her will; it is holographic.

One of the subscribing witnesses, whose testimony I see no reason to doubt, completely establishes the due execution of the paper according to the very letter of the law. I do not find the time to analyze her testimony and make comparison between her statements and those of the other subscribing witness and point out what to me is abundant reason for accepting

her story as the truth, nor do I believe that the other subscribing witness, who contradicts her, and upon whose testimony, if believed, the paper must be rejected, has intended to suppress the facts. She is mistaken. Her memory is at fault.

It is perfectly clear to me that the testatrix, at the time she signed the paper knew it was her will, and she intended to execute it according to law, and she attempted to do so. One witness says she succeeded and one says she did not. Aided by other facts and circumstances surrounding the execution of the paper, I have no doubt about the matter.

The principle involved will be found sustained by the following cases: Baskin v. Baskin, 36 *N. Y.* 416; Coffin v. Coffin, 23 *N. Y.* 10; Gilbert v. Knox, 52 *N. Y.* 125; Trustees, &c. v. Calhoun, 25 *N. Y.* 422; Lane v. Lane, 95 *N. Y.* 494.

I sustain the learned assistant to the Surrogate in his ruling against contestant as to the witness Gaynor.

Petition for revocation of probate is denied.

KINGS COUNTY.—HON. GEORGE B. ABBOTT. SURROGATE.—January, 1890.

MATTER OF DE GROOT.

In the matter of the application for probate of the will of SARAH M. DE GROOT, *deceased.*

To entitle the admission to probate of a will destroyed in the lifetime of testator, it is necessary to prove an actual fraud against testator in the destruction of his will.

MATTER OF DE GROOT.

The provisions of section 1865 of the Code of Civil Procedure requiring that the provisions of a destroyed will shall be distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness, are to be liberally construed.

Upon an application to admit to probate a will which had been destroyed in the lifetime of deceased, it appeared that it had been executed with due deliberation, bequeathing and devising everything to a person to whom she was engaged to be married. Although she had abundant opportunity, had she so wished, to destroy the will, testatrix did not do so, but it was on the morning of the day of her death destroyed out of her presence by her brother under circumstances indicating stealth in the preparation for its destruction. In addition to some testimony as to the expressed intention of testatrix the only evidence tending to prove that the destruction of the will was by direction of deceased was that of the brother and that was full of contradictions and improbabilities. The testimony of a servant showed that on the morning of the day of the destruction of the will testatrix thought the will was still in the box where it had been kept, and that she had not changed her testamentary intent or her sentiments towards her intended husband up to that time. *Held*, that this evidence was sufficient to show a fraudulent destruction of the will.

Testatrix had made a holographic will which she delivered to her attorney with directions to draw a new will containing the same provisions. The draft of the new will made by the attorney was produced before the Surrogate and it was shown that this draft corresponded word for word with the will afterwards executed, except in two specified particulars. One C. dictated from the draft to the attorney M. and both these witnesses testified as to the correspondence of the will to the draft as described. *Held:* that there was sufficient proof of the will to justify its admission to probate, upon proof of its fraudulent destruction during the lifetime of testatrix.

APPLICATION for the probate of a will which had been destroyed in the lifetime of testatrix.

The deceased testatrix Sarah M. De Groot was engaged to be married to Mr. Hodgkinson who was much younger than herself. In June, 1881, while in good health she executed a holographic will leaving her entire property to Hodgkinson. On 26th July following, being very ill, she consulted her attorney and was advised by him that her will had not been executed as required by law. She then directed him to draw

up a new will and incorporate in it the same provisions. The attorney drafted the new will containing all the provisions of the old one and from this draft one C. read it off to the attorney word for word, who wrote from his dictation, reading back to C. each phrase as he wrote it, to insure accuracy. There were only two changes made from the draft in the will as finally drawn, in reference to which the testimony was clear. Testatrix executed the new will and destroyed the holographic will. Upon the hearing before the Surrogate both C. and the attorney identified the draft of the will and testified in regard thereto as stated above. This is the will which was destroyed on the morning of the death of testatrix. The facts as to the destruction appear in the opinion of the Surrogate.

This is an application to admit the destroyed will to probate.

JOHN C. MCGUIRE, *for proponent.*

G. C. & F. REYNOLDS, *for the contestants.*

THE SURROGATE.—This is an application to prove a will alleged to have been fraudulently destroyed during the lifetime of the testatrix. The case of Timon v. Claffy, 45 *Barb.* 438, settles the law applicable to the questions here presented, so far as this proceeding involves a construction of sections 2621 and 1865, of the Code of Civil Procedure, and section 42, article 3, title 1, chapter 6, of the Revised Statutes (8th ed. 2548). In accordance with this decision, to entitle the proponents to a decree admitting the destroyed

will to probate, it is necessary for them to prove an actual fraud against the testatrix in the destruction of her will. The case, therefore, turns upon the question whether this will was fraudulently destroyed in the lifetime of the testatrix. It is conceded that the will was, in fact, destroyed by Horatio St. John, the brother of the testatrix, in the presence of Coziah Fanning, a trained nurse, who was attending the testatrix in her last illness, and Maggie Burns, the servant of the family. This was done by burning the will in the kitchen stove on the afternoon of the same day on which the testatrix died, a few hours later.

In June, 1889, the testatrix, who was a widow lady of middle age, while in her usual health, wrote a holographic will, leaving the bulk of her property to Mr. Hodgkinson, a man much younger than herself, to whom she was engaged to be married. In the July following she became seriously ill, and fearing that her holographic will might not be legally adequate to the fulfillment of her testamentary desires, sent for her lawyer, Mr. Maguire, on the 26th inst., and directed him to prepare her will in proper legal form, so as to dispose of her property in the same manner as expressed in her holographic will, giving him the paper. The will was so prepared and executed on the same day, and the holographic will was then destroyed in her presence. This expression of testamentary intent could not have been more deliberate, decided or careful. She died on the 31st day of July, five days later. It is impossible to harmonize the testimony of the nurse, Coziah Fanning, with that of the servant, Maggie Burns, as to the declarations of the

testatrix in relation to the destruction of the will. The testimony of the servant, however, impresses me as being the more ingenuous.

If the bent of the mind of the testatrix was as testified to by the nurse, I cannot comprehend why the testatrix did not destroy the will herself, or why the nurse did not communicate this wish of the testatrix to the brother when he came a little later on that day, instead of waiting until the next day and then imparting it to him by accident. The testatrix never lacked opportunity to destroy the will herself, and there seems to me to have been too much of stealth in and preparation for its destruction by others to make the act appear in the light of an open and above board transaction.

I am obliged to utterly disregard the testimony of the witness, Horatio St. John, for the reason that it is so full of contradictions and improbabilities as to stamp it as unworthy of credence. While he is not an interested witness, so as to exclude his testimony under section 829 of the Code, the only person who stands between him and such interest is his father, a feeble and decrepit old man. From the testimony of Maggie Burns, it appears that the testatrix thought the will was still in the box the morning of the day she died, and she had not changed her testamentary intent up to that time, or her sentiment of regard for Hodgkinson. Later in the morning we find the box, in which the will was kept, in the hands of the wife of Horatio St. John. After this, early in the morning, St. John calls the nurse out of the room and asks her to go with him and see him burn the will, and within a few

hours before her death, and not in her presence, the will is burned in the kitchen stove.

No explanation is even suggested as to what might have produced any change in the testamentary intention of the deceased, so clearly expressed by her five days before, and after many weeks of careful deliberation. Her intimate and affectionate relations with Hodgkinson had never been interrupted, and continued to the very hour of her death. Upon all the evidence, and the peculiar circumstances surrounding the transaction and occurrence, I cannot resist the conclusion that the will was destroyed fraudulently, without the consent or direction of the testatrix. Section 1865 of the Code requires that the provisions of the will be clearly and distinctly proved by at least two credible witnesses, "a correct copy or draft being equivalent to one witness." This section is to be liberally construed. Hook v. Pratt, 8 *Hun* 102–109, and I think the proponents have sufficiently complied with its requirements. Let a decree be entered establishing the will and admitting it to probate.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—March, 1890.

MATTER OF KENNEDY.

In the matter of the estate of JOHN A. KENNEDY, *deceased.*

Where an administrator, acting in good faith, has allowed the funds of the estate to remain idle he will be only charged with simple interest thereon. It is only in cases of gross negligence or bad faith that he can be charged with compound interest.

HEARING of exceptions to the report of a referee. The facts appear in the opinion of the Surrogate.

T. W. FOSTER, *for the administratrix.*

W. H. MUNDY, (BENJAMIN W. WRIGHT of counsel,) *for the contestant.*

MICHAEL J. SCANLAN, *special guardian.*

THE SURROGATE.—The good faith of the administratrix is found by the referee, and is manifest from the testimony. I am of opinion, therefore, that in the exercise of the discretion lodged in the court by the law with reference to imposing the penalty of compound interest, I must overrule the referee in that regard.

Compound interest is allowable in cases of gross delinquency, or as a penalty for negligence or wrong doing, or for some clear violation of a trust. There is no uniform rule of redress, but each case calls for

the exercise of the judicial discretion of the court. Thorn v. Garner, 42 *Hun* 514.

A recent case upon this subject, which contains a comprehensive review of the authorities, is Cruce v. Cruce (81 *Mo.* 676–686), and the court reached the conclusion that "all orders for periodical rests and for compounding interest should be adopted, not for punishing the delinquent trustee, but for the purpose of attaining the actual or presumed gains, and to make certain that nothing of profit or advantage remains to the trustee."

The doctrine thus stated is but a reiteration of the law as laid down in our own state. Utica Ins. Co. v. Lynch, 11 *Paige* 520. In that case the court stated the rule to be: "The court in charging a trustee with interest, when he has commingled the trust fund with his own, or has neglected his duty in relation to the fund, does not always proceed upon the ground that the trustee has made a profit by his breach of trust. It is true he is not permitted to make a profit out of the trust fund for his own benefit. If he has employed the fund in trade, whereby he has made more than simple interest, he may be charged with the whole of such profits, either by making periodical rests and charging him with compound interest, or in such other manner as may best carry out the principle of giving to the cestui que trust the benefit of all profits made beyond the simple interest. In cases of that kind, the principle of the court appears to be to allow simple interest only where it is evident that the profits made by the trustee could not have exceeded that amount. But if it is doubtful whether

the profits were not greater, then to allow the cestui que trust to elect between such interest and an inquiry as to the actual profits made out of the trust fund. Stating the account with periodical rests and compounding the interest is only a convenient mode adopted by the court to charge the trustee with the amount of profits supposed to have been made by him in the use of the money, where the actual amount of profits which he has made, beyond simple interest, cannot be ascertained." See, also, Wyckoff v. Van Siclen, 3 *Dem.* 75; Clarkson v. De Peyster, *Hopk.* 424; Baker v. Disbrow, 18 *Hun* 29.

For a mere failure to invest, simple interest will be charged. Thorn v. Garner, *supra;* Duffy v. Duncan, 32 *Barb.* 587.

In this last case, assignees for the benefit of creditors retained a large sum of money for many years without any effort on their part to distribute it among their cestuis que trust. The money was commingled with their individual funds. Held, that they were chargeable with simple interest thereon, although there may have been no profit by their use.

In Lansing v. Lansing, 45 *Barb.* 182, it was held that if the trustee negligently suffers trust moneys to lie idle, he is chargeable with simple interest. If he converts the trust moneys to his own use, and employs them in business or trade, he is chargeable with compound interest. While trustees are held to great strictness in the management of trust funds, the court will deal leniently with them when it appears that they have acted in good faith, and if no improper motive can be attributed to the trustee, the court will

excuse the apparent breach of trust, unless the negligence is very gross.

In the present case, I am of opinion that a proper case is presented for the simple indemnification of the cestuis que trustent. To that end, the charges of compound interest made by the referee will be disallowed. In case of the reinvestment of the proceeds of the sale of the Broadway and Seventh Avenue Railway stock, the administratrix should be charged with the amount of interest received by her thereon, and with simple interest upon the periodical payments from the date of their receipt to the date of the account.

The interest upon the sum referred to in the seventeenth finding and likewise upon the value of the library should be simple interest. The same applies to the interest upon dividends and other sums received periodically from the securities held by the administratrix. She should be charged with simple interest upon such sums from the date of their receipt to the date of the account.

The evidence relied upon to support the charging of the account with $250, referred to in the sixteenth finding, while probably sufficient for that purpose, is still entitled to no more weight or consideration than the testimony immediately succeeding, which should entitle her to credit for its payment to the next of kin. Properly stated, the account should debit and credit her with the same, without interest.

My conclusion, not to charge the administratrix with compound interest is founded upon her good faith, evidenced in many ways apart from her refusal

to interpose the apparent defence of the statute of limitations, and upon the acquiescence of the next of kin for more than fifteen years. It is plain the referee would have acted likewise had he been of the opinion that he had discretion in the matter.

In all respects, except as above indicated, the report of the referee is confirmed.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—March, 1890.

MATTER OF HALSEY.

In the matter of the application for the probate of the will of ISAAC HALSEY, *deceased.*

Statements made by a testator to his physician made while he was in attendance upon him, which the physician testifies were not necessary to enable him to act in his professional capacity, are admissible in evidence in probate proceedings.

APPLICATION for the probate of a will.

The facts appear in the opinion of the Surrogate.

FRANK W. ANGEL, *for the proponents and legatees.*

H. F. LAWRENCE, *for contestant.*

W. J. C. BERRY, *special guardian.*

THE SURROGATE.—Contestant's counsel excepted to the ruling of the assistant, to whom this proceeding

was sent to take the testimony, by which he excluded proof by the witness Dr. Densmore, of a statement which the decedent made to him and which, the witness stated, was not necessary to enable him to act in his professional capacity.

The rule prohibiting physicians from disclosing information obtained by them from their patients, was the same under the Revised Statutes. Nevertheless, it was held in Allen v. The Public Administrator, 1 *Bradf.* 221, that testamentary cases were not within the reason and intention of the statute, and if covered by its letter, then the decease of the party put it beyond possibility to assert the privilege, and if still, from reasons of public policy, the court felt bound to extend and keep alive the privilege, it would not be done any further than was consistent with justice and good morals. This rule continued to be followed in probate cases until the decision in Renihan v. Dennin, 103 *N. Y.* 573. In that case the Court of Appeals held that the fact that the evidence offered was in a probate proceeding did not make the application of section 834 of the Code less operative; and at the close of the opinion Judge EARL said: "It is probably true that the statute, as we feel obliged to construe it, will work considerable mischief. In testamentary cases, where the contest relates to the competency of the testator, it will exclude evidence of physicians, which is generally most important and decisive. . . . . The remedy is with the legislature and not with the courts."

Since that decision, the practice of this court has been to ask the physician, when an objection was

raised to the proof of facts learned in the course of his professional relations, whether what he was asked to testify to, was necessary for him to treat the patient; if he answered that it was not, it has been admitted. But there is a tendency to apply the rule with great strictness, and the language of VAN BRUNT, C. J., in the Matter of Darragh, 52 *Hun*, 636, seems to have been relied upon by the assistant to sustain his ruling in excluding the testimony of Dr. Densmore offered. The court in that case say: "It is urged upon the part of the appellant, that it was not shown that the knowledge which he had acquired in respect to his patient by the physician while he was attending her was necessary to enable him to prescribe for her. But it seems to us, in view of the rule laid down by the Court of Appeals, in construing the statute prohibiting the disclosure by physicians of the information they have received in respect to the condition of their patients, that it was not necessary that this should be established, and that all that it was necessary to establish, in order to preclude the physician from testifying, was that he had obtained the information during the course of his professional employment. And this is the only reasonable construction to be placed upon the statute, because, otherwise, it is placing it within the physician's power to violate the statute at will. The information which the physician receives by his eyes, by his ears and by his touch is in the course of his professional employment, and it may or may not be necessary for the purpose of prescribing, and this necessity may only be disclosed by the very fact of the imparting of the information, and

therefore, although information of this character may be communicated, supposedly, under the safeguards thrown around such communications by the law, yet it may turn out that such disclosure was not necessary to enable the physician to act in a professional capacity; but this could only be ascertained after the disclosure had been made. It is so difficult to draw the line that it is certainly best to err upon the side of safety and shut the door against all disclosures of information acquired by a physician in attending a patient in a professional capacity, without requiring absolute proof that such information was necessary to enable him to act in that capacity. The intention evidently was to protect all communications made by a patient to his physician, which the patient supposed, or had reason to believe, were protected by the provisions of the law."

As the Court of Appeals acknowledges that the rule laid down in Renihan v. Dennin is one, which will exclude important testimony in a probate proceeding, and which the court invokes the legislature by its action to make admissible, I cannot believe that the General Term, in the Matter of Darragh, intended to exclude the testimony of a physician, which he, on his oath, stated was not necessary for him to act in his professional capacity. Hence, I hold that the exclusion of the information obtained by Dr. Densmore, under these circumstances, to be error, and I direct that the case be sent back to the assistant to take any testimony of the witness Densmore which is admissible under the rule I have here laid down.

The suggestion by contestant's counsel, that it was

not shown that the witness was an authorized physician, was not raised at the time of his examination. He was produced by the contestant as a physician, and the assistant had a right to suppose, without making inquiry himself, that he was authorized to practice his profession. That question, however, may be raised on the further examination of the witness. The other legal points suggested in contestant's brief I will consider when the case shall be finally submitted.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—March, 1890.

MATTER OF RYDER.

In the matter of the estate of JACOB L. RYDER, *deceased.*

Although the general rule is that as between members of the same family neither party can recover for services rendered in the absence of an express agreement, nevertheless, where it appears that extraordinary services have been rendered by one member of a family to another and that there has been no reciprocity of services possible, a claim for such services may be allowed against the testator's estate.

Testator, a paralytic, was in such a condition that he had to be attended to with the same care as an infant. *Held*, that his daughter who took care of him, with whom he lived and to whom he had made a general promise of reward was upon his death entitled to compensation out of his estate.

ACCOUNTING of executrices.

The testator died at his home in Mount Kisco on

the third of August, 1888, leaving him surviving as his widow, Hester M. Ryder, and his daughter, by a former wife, Sarah E. Hall, and the claimant, who is a daughter of his last wife. Mrs. Hall has been for many years residing away from home with her husband. The testator owned a house and lot in which he and his wife with the youngest daughter resided alone together until the latter was married to Mr. Dromgoole in or about the year 1881, when he also became a member of the family. No special agreement with him is shown but while the claimant and her husband continued to live in testator's house, Mr. Dromgoole and Mr. Ryder both contributed in furnishing supplies for the family. About February, 1887, the testator became so ill from softening of the brain as to require considerable care. As the disease progressed, more and more attendance and services were required, until, toward its latter stage, they were almost unremitting in their character. Attendant upon, and as a consequence of the disease, he lost control of his organs of evacuation, and a large part of the time was devoted by Mrs. Dromgoole to the cleansing of his person, his linen, and other clothing, bedding and the carpet of his room. He required watching lest he should wander away and much of the latter part of the period had to be confined in his room. The most of these necessary offices were rendered by Mrs. Dromgoole, as it was difficult to keep a servant on account of the fœtid condition of the atmosphere of the house.

By his will, made prior to his illness, and in which his wife and Mrs. Dromgoole were appointed execu-

trices, he divided his property equally between his wife and two daughters.

Mrs. Dromgoole presented a claim for these services, in October last amounting to $2,160, but she had previously presented one for the same services, amounting to only $1,080.

WM. H. ROBERTSON, *for claimant.*

FROMME BROTHERS, *for* MRS. HALL, *legatee.*

THE SURROGATE.—Undoubtedly, the general rule is that as between members of the same family, neither party can recover for services rendered, in the absence of an express agreement or promise to pay. This rule is founded upon the idea of reciprocity between them, and the fact that the value or benefits received by one are greater than those received by the other, will make no difference. They must, however, be mutual. To illustrate: suppose this claimant had sought to recover for services rendered before the testator became ill, she would have been effectively met by the rule in question; but when his illness became so serious as to deprive him of the power, in any manner, of reciprocating the care and kindness bestowed, and he became a grievous burthen, one would suppose the normal relation to have largely ceased; and, while the law of nature demanded that he should be properly nursed and cared for by his child, yet that those services should receive some compensation from his estate, if he left any, as against those entitled to share it, who contributed nothing to the disagreeable work. The fact that Mrs. Hall had a family

of her own and lived at a distance was a sufficient reason why she could not share in the nursing, etc., which naturally fell upon the claimant, who was an immediate member of the family, but, as she could not contribute her personal services, it would seem but equitable that she should furnish an equivalent out of her portion of the estate. Our statute makes it the duty of the children, of sufficient ability, of any poor person, who is so impotent or decrepit, as to be unable by work to maintain himself, at their own charge, to maintain him. Why then, in a case of this kind should they not equally share, in some form, the burthen his illness and the circumstances cast upon one? And it may be remarked, in this connection, that in many cases cited by the learned counsel, as well as numerous others examined, none presents the precise state of facts under consideration here. In the leading case of Williams v. Hutchinson, 3 *N. Y.* 312, the claim was made by a step-son for services. So of Hill v. Hanford, 11 *Hun* 536. In Wotherspoon v. Wotherspoon, 49 *Super.* 152, there appeared to be only one son, and the claim related to the board of the father. Maltby v. Harwood, 12 *Barb.* 473, related to the case of a supposed apprentice, whose claim was not for wages. In Bowen v. Bowen, 2 *Bradf.* 336, a claim for wages was presented against the estate of his deceased brother. The case of Keller v. Stuck, 4 *Redf.* 294, approaches in its facts, more nearly to this than any that has been brought to my notice. An administratrix of a deceased sister, and the only next of kin, except a nephew and niece, sought to prove a claim for services in nursing the

intestate in her last illness. It did not appear what the nature and extent of the services were, and it was rejected on the strength of Williams v. Hutchinson.

In certain cases, where it is impossible from the circumstances, to imply a contract between the parties, the law will imply one, as if in the absence of a husband, a neighbor incur an expense in burying his deceased wife, in a manner suitable to the husband's condition in life, though without his knowledge the law will imply a promise to reimburse the person who incurred the expense. Jenkins v. Tucker, 1 *H. Bl.* 90. So one might suppose that if a person were so entirely insane as to preclude the possibility of his making a contract, and were to be kept, managed, cared for and controlled by another, a contract might be implied so that the value of the services rendered might be recovered; but the answer to that would probably be that a committee might have been appointed who would have been competent to contract for him.

The difficulty here, however, is that from the relation of the parties, as determined by most of the cases cited, no contract can be implied. There must be either an express agreement, or a promise to pay or reward for the services rendered, no matter how meritorious or equitable the claim may be.

This brings us to the question as to whether there was any valid promise of reward made by him to Mrs. Dromgoole, for her services. There is no doubt, from the evidence, that he made such promise, but counsel for contestant claims that he lacked mental capacity sufficient to render such promise of any binding force.

The testimony on the subject is very meagre, in view of the importance of it. There is an abundance on the subject of his physical weakness, but very little in the way of detailed facts and conversations, tending to furnish a key to his mental condition. It was doubtless somewhat variable. At times he talked of going home—probably intending to indicate the home of his youth. This, accompanied by an attempt to get away would lead to the belief in some intellectual aberration at the moment. Again, following a cleansing of his person, by the claimant, he would declare his intention to compensate her for the trouble he gave her. This showed a mind capable of being impressed by current facts and competent to apprehend their relations. He also told Hunter, his nurse, that he had made his will and correctly stated what disposition he had made of his property. Hunter conversed much with him, but it is to be regretted that we have no details of such conversations. Still, the evidence scant as it may be, is deemed enough to warrant the conclusion that he had sufficient intellect to make the promises he did.

It remains, therefore, to fix a reasonable compensation for the services. It is apparent that there was a progressive increase of them, as required and rendered; and for them a compensation cannot be expected, equivalent to that charged by skilled, trained nurses. It is believed that $1,000 being very near the amount of the bill first rendered, will be a fair compensation. As this amount will be deducted from the whole amount of the estate, each of the three who

owed the natural duty will have equally contributed her share.

CATTARAUGUS COUNTY.—HON. ALFRED SPRING, SURROGATE.—March, 1890.

MATTER OF DAGGETT.

In the matter of the estate of DANFORTH DAGGETT, *deceased.*

Under chapter 408 of the Laws of 1889 it is the duty of an appraiser of the estate of a decedent to set aside to the widow a life estate in real estate of the value of one thousand dollars, and one hundred and fifty dollars of the personal estate; but if upon computation, the present value of the life estate in the realty and of the dower interest therein, these sums in addition to the one hundred and fifty dollars of the personal estate do not aggregate one thousand dollars, sufficient personal estate must be set apart to the widow to make up that amount.

The words of the statute "in addition to the dower rights," etc., are not words of exclusion.

The widow takes the portion of the estate set aside for her under the statute free from the claims of the creditors of the decedent.

MOTION to compel the correction of an inventory.

Chapter 406 of the Laws of 1889 in section 1, amends the Revised Statutes, part 2, chapter 2, as amended by Laws of 1830, chapter 320, by adding thereto § 30, which provides that where an intestate leaves a widow and descendants, the widow in addition to any interest to which she may be entitled under the preceding sections of part two, chapter two, just cited, shall be en-

titled to the use during her life of an additional portion of the estate not exceeding in value one thousand dollars and in case the intestate shall leave a widow and no decedents, then the widow shall be entitled to the absolute ownership in fee of such additional portion of the estate.

Section two of the same act, chapter 406 of the Laws of 1889, amending Laws of 1842, chapter 157, section 2, ("An act to extend the exemption of household furniture and working tools from distress for rent and sale or execution,") provides that where a decedent leaves a widow there shall be appraised and set apart to her necessary household furniture, provisions or other personal property in the discretion of the appraisers in addition to the articles of personal property now exempt from appraisement not to exceed one hundred and fifty dollars in value, and in case the interest of the widow in the real estate of a deceased husband in addition to her dower right together with the one hundred and fifty dollars shall be of less value than one thousand dollars, then said appraisers shall set apart for the use of said widow personal property which, together with the real estate, shall amount to one thousand dollars.

F. A. SCOTT, *for petitioner.*

C. D. VAN AERNAM, *for the administrator.*

THE SURROGATE.—This is a proceeding to compel an amendment of an inventory and involves the construction of chapter 406 of the Laws of 1889.

In this case, the intestate died seized in fee of real

estate valued at $1,150, and personal property amounting to about $500. The appraisers seeking to comply with the act cited, set apart to the widow a tract of land valued at $1,000, and the $150 in personal property provided by chapter 157 of the Laws of 1842, and also the enumerated articles of household furniture designated in the Revised Statutes, so far as the scant Penates of decedent permitted.

The contention of the widow is that the appraisers have not set apart sufficient personal property to meet the requirement of subdivision 2 of the act of 1889.

The act first adds an additional section to chapter 2 of article 2 of the Revised Statutes, and purports to give a widow something in addition to any interest she may have by the preceding sections of the chapter. The occult significance of this is unfathomable in view of the fact that chapter 2 relates solely to title to real property by descent, and does not by express terms, or by implication, give a widow anything whatever.

It seems plain, however, that the meaning of this additional section 30 is to give the widow of an intestate the use of real estate of the value of $1,000 unless he leaves no descendant, in which event her title is absolute in fee, and this interest in real property is in addition to any title she may otherwise have in the estate of her deceased husband, for it does not assume to restrict or be in lieu of her dower right.

Section 2 of this act is, however, an amendment of chapter 157 of the laws of 1842, and relates to personal property, and is contingent in its scope, and effect upon the previous section.

If the decedent leaves real estate, so that the actual present value of the portion set apart to the widow in compliance with section 30, and the actual present value of her dower interest and this $150 provided for in this section amount to $1,000, then the appraisers are not to set apart to her any other personal property; but if these together make less than $1,000, then they are to appraise for her use sufficient personal property to make up for this deficiency. That is, to render effectual these new duties foisted upon the appraisers, it is their office:

First: To set apart to the widow real estate of the value of $1,000.

Second: To ascertain the age of the widow and compute the present value of this interest by the annuity tables.

Third: To make a similar computation as to her dower interest.

Fourth: To set apart the $150 required by § 2 of the act.

Fifth: Add together these sums, and if their sum total is $1,000, the complex duties of the appraisers terminate.

If, however, they do not amount to that sum, then they are to set apart personal property sufficient in value to make up the $1,000.

To the ordinary appraiser, unlearned in the niceties of the annuity tables, this involves much circumlocution, and imposes upon him more of a burden than is consistent or reasonable, yet there is no other method devised to carry into execution this well meaning but intricate statute.

There is no provision in the statute empowering the appraisers to set off this land by metes and bounds, or to incorporate a description of it in the inventory or to cause the same to be recorded in the office of the clerk of the county in which the land is situate. The only authority they seem to possess as to the real estate is to appraise it for the purpose of making operative section 2 of the act, but this makes an appraisal necessary in every instance, for in no other way can it be determined whether or not the widow is entitled to the additional personal property. The counsel for the widow argues that in making the computation for the purpose of arriving at the amount of personal property to be set apart to her, the value of the dower interest and the $150 are not to be taken into account. That is, that the design of the statute is to increase the interest of the widow by $1,000 in any event, and the words in section 2, "in addition to the dower rights," etc., are words of exclusion.

The language does not warrant this construction. The first section relates exclusively to real estate, and it is clearly an enhancement of the widow's interest therein, but no mention is made of her dower.

In the second, specific reference by words of inclusion is made, not alone to the preceding section but also to the dower rights and the $150, using the significant term, "together" to show the unity of these two, and the equally pointed phrase, "in addition," to indicate they are to be taken in the computation with the interest referred to in section thirty.

If the intention was to have the computation based solely upon the first section, there was no necessity of

lugging in any language referring to the dower interest, for there had been no mention of that right in the preceding portion of the statute. If the design had been to restrict this calculation to the value of the land mentioned in section 30, there would have been an entire omission of the words "in addition to her dower right and together with said $150." Either that language must be given its ordinary significance, or else treated as surplusage, and the latter course will not be followed where the words can be given their usual acceptation without repugnance to the general scope of the statute.

Again, the words "in addition" do not ordinarily mean "exclusive of," but are diametrically opposed to the idea of diminution or abatement, but signify an increase of or accession to. There is still another question of grave importance involved in the construction of this statute.

Does this portion set apart to the widow apply as against the creditors of decedent?

I am inclined to think it must have that effect. Section 2 of the act is an amendment of the statute extending the list of articles exempted from "distress for rent" and "sale under execution," and surely, so far as that section is concerned, the interest the widow takes in the property is absolved from any interference by the creditors of the deceased husband. The $150 set apart to her by this statute are not amenable to the husband's debts, and the other property coming to her by virtue of this same statute would also be freed from the debt charged as they passed by the same language.

It would hardly be consistent to make the property set apart under the first section of this act of 1889 subject to the claims against the husband, while that provided for the widow in the second section without any variation in the language and which is interwoven with and dependent upon the first section is held by her exempt from such claims.

While this interpretation may be unjust to creditors, the same argument is patent when applied to her dower interest or to her rights acquired by her in his personal property under the act of 1842, and prior to the passage of this statute in controversy. The whole scheme is predicated upon an evident intention to assure to the widow a larger interest in the deceased husband's property, and is simply in line with the rights formerly possessed by her.

In this case, the widow is of the age of seventy-two years.

The actual present value of her dower interest is,	$105.49
Of the land set apart to her by the appraisers,	275.20
Add property set apart by appraisers,	150.00
Total,	$530.69

Leaving to make up the sum of $1,000, $469.81, which the appraisers must set apart to the widow from the personal property, or in case there is insufficient for that purpose, so much thereof as there may be, and an order will be entered accordingly.

MONROE COUNTY.—HON. JOSEPH ADLINGTON, SURROGATE.—March, 1890.

MATTER OF CLEMANS.

In the matter of the judicial settlement of the account of the executors of MOSES S. CLEMANS, *deceased.*

Where land upon which a crop is growing is so devised by testator as to convey it to the devisee, unless a contrary intention plainly appears from the will the crop is on the footing of a chattel specifically bequeathed to the devisee.

In such case the crop cannot be sold for the payment of general legacies, and can be applied to the payment of debts only after other assets not specifically bequeathed have been so applied.

A clause in the will of testator which provides that after the payment of testator's debts "if anything is left from the personal property it shall be equally divided between my children share and share alike" does not apply to growing crops on land specifically devised.

ACCOUNTING by the executors of Moses S. Clemans, deceased.

W. D. SHUART, *for executors.*

J. H. CHADSEY, *for the contestant.*

THE SURROGATE.—The above named decedent died March 12, 1888, leaving a will dated January 21, 1880, which has been duly admitted to probate. The will first directs the payment of debts, and then devises to different members of testator's family seven distinct parcels of land. Then comes the ninth and last dispositive clause, which is as follows, viz.:

Ninth: "From my personal property the debts are

to be paid and funeral expenses, then if there shall be a monument erected at my grave costing not less than $500, to be for the executors to decide the amount if greater than $500, then if anything is left from the personal property, it shall be equally divided between my children, share and share alike."

Proceedings for an accounting have been duly taken by the executors; objections to their account were filed by the contestant, and the whole matter was referred for trial and determination. The referee's report has been filed, and an exception thereto brings up for consideration the only question now in dispute, to wit, the ownership of a crop of wheat which at the time of the testator's death was growing on lands devised to Mary S. Osborn and Amasa Clemans. Nineteen thirtieths of the wheat is conceded to have been upon land devised to the former, and the remainder upon that devised to the latter.

The executors gathered and sold the crop, realizing therefrom the net sum of $655, which they now maintain should be equally divided among all the children of the testator under the direction of the said ninth clause of the will. The devisees claim that by implication of law the growing crop was specifically bequeathed to them as a part of the devise, and that having been sold, the proceeds belong to them. The referee sustained the view of the executors.

The testator left other personal property, which amounts to over $3,300 after payment of all debts and funeral expenses, including the erection of a monument.

The rules of the common law on the question here in issue may be briefly stated as follows, viz.:

First, Crops growing on the land of a decedent at the time of his death are personal property.

Second, If the decedent dies intestate, or testate, without devising his land, such crops go not to the heir but to the executor or administrator of the decedent, for payment of debts and for distribution according to law.

Third, If the decedent dies intestate, having devised the land on which crops are then growing, such crops go to the devisee, and not to the executor.

The presumed intention of the testator, that he who takes the land shall take the crops which belong to it, is one reason for the rule last stated; and that principle that every man's donation shall be taken most strongly against himself and those claiming under him is another.

These propositions are abundantly sustained by the following authorities. 1 Williams on Executors, Perkins' 6th Am. ed. 781 (710), 785 (714); Toller on Executors, 150, 203; 3 Redf. on Wills, (3d. ed. 154); McClellan's Surrogate's Practice, 3d. ed. 240; Spencer's case, *Winch.* 51; Anonymous, *Croke's Eliz.* 61; Dennett v. Hopkinson, 63 *Me.* 350; Budd v. Hiler, 27 *N. J. L.* (3 *Dutch*) 43; Shafner v. Shafner, 5 *Sneed* 94; Bradner v. Faulkner, 34 *N. Y.* 347; Stall v. Wilbur, 77 *Id.* 158.

The Revised Statutes of this state, (vol. 2, p. 83, § 6, subds. 5 and 6,) make a slight change in the rule of the common law as to growing crops on devised land.

The change and its effect have been clearly and admirably stated in the last two cases cited, substantially as follows: The Revised Statutes provide that the growing crops shall go to the executor or administrator to be applied and distributed as personal estate. Under this provision, the personal representative takes possession of the growing crops, in the first instance, as he does of all other personal property for the purpose of administration according to law. But when the land on which the crop is growing has been so devised as to convey it to the devisee, unless a contrary intention plainly appears from the will the crop is put on the footing of a chattel specifically bequeathed. If not wanted for the payment of debts or legacies, it goes to the devisee. It cannot be sold for the payment of general legacies, and can be applied to the payment of debts only after other assets, not specifically bequeathed, have been so applied. The same language that would devise or bequeath such crops before the statute will pass them now.

Under these decisions, it was the obvious duty of these executors to take possession of the growing crops on the lands devised to Mary S. Osborn and Amasa Clemans, and to harvest the same. If the proceeds thereof were needed to pay the debts of the testator, they could sell the grain and apply the money received for it to the payment of such debts. If, however, the other personal property of the decedent was sufficient to pay all legal indebtedness, the executors upon ascertaining that fact should have turned over the crops, or their proceeds if sold, to the devisees as personalty, specifically bequeathed to them

by the will, unless that instrument gave directions for some other disposition thereof.

The claim is made on the part of the executors that such direction is given in the latter part of the ninth clause of the will, and that by the words, "If anything is left from the personal property it shall be equally divided between my children share and share alike," the testator indicated his intention to take from the devisees the crops growing on the land at his death, and to give them in equal shares to all his children.

The clause here in question must be considered in its relation to the other provisions of the will, and in arriving at the intention of the testator as expressed in that instrument, all of its parts must be construed together.

It seems to me that the words above quoted have not the effect claimed for them. They signify no more than is expressed by the usual residuary clause found in wills relating to personal estate. They carry only what had not been legally and effectually disposed of by the foregoing provisions of the whole will. Thompson v. Thompson, 3 *Dem.* 409–412; Beekman v. Bonsor, 23 *N. Y.* 312; Christie v. Hawley, 67 *N. Y.* 133, 137; Kerr v. Dougherty, 79 *N. Y.* 327, 346.

The growing crops on the lands devised had been previously specifically bequeathed, by the force of the devises themselves and would not, therefore, be carried away from the devisees and swept into the general residue on which the words in the ninth clause could take effect.

That such language is insufficient evidence of a tes-

tator's intention to deprive his devisee of the growing crop is clearly established by the decision in Bradner v. Faulkner, 34 *N. Y.* 347.

The controversy in that case was over a crop of wheat growing at testator's death, upon land devised by the will of one Amariah Hammond. A copy of that will, with the briefs of counsel, is found in the printed case, on appeal to the Court of Appeals, on file in the Rochester law library. I infer from the provisions of the will that Mr. Hammond left two daughters, who were his only heirs at law and next of kin. By his will, he devises to each of these daughters certain parcels of land, and to one the sum of $16,000, to equalize her share in his estate with that of the other. He then directs that his daughters shall furnish a suitable maintenance for life to a servant named, which should be a charge on the lands devised. He next states that it is his intention to give his daughters, in all respects, equal advantages in the disposition of his estate; and, after some directions here unimportant, closes with the following words: "All the rest and residue of my estate whatsoever of which I may die seized or possessed, of whatsoever kind or nature the same may be, not hereinbefore given or disposed of, I give, devise and bequeath to my daughters."

In its general features, the will of Mr. Hammond is singularly like the one here under consideration. The principles of construction applicable to the one are equally so to the other. The claim that the testator intended that the crops growing on his land at his death should be distributed under the residuary clause of the will was urged upon the Court of Ap-

peals in the printed brief of the executor's counsel, but in its opinion, after referring to the rule that growing crops pass to the devisee, upon the presumed intention of the testator that he who takes the land should also take the crops which belong to it, the Court of Appeals says: "There is nothing in this will to alter or affect this presumed intention of the testator." To the same effect are the following cases, viz.: Blake v. Gibbs, 5 *Russ. Ch.* 13, note; Rudge v. Winnall, 12 *Beav.* 357; Vaisey v. Reynolds, 5 *Russ. Ch.* 12; Pratte v. Coffman, 27 *Mo.* 424.

I am of the opinion that the wheat passed as a specific bequest to the devisees of the land, and, as it has been sold, that they are now entitled to its proceeds.

There may be a decree modifying the referee's report and settling the account in accordance therewith on two days' notice.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—March, 1890.

MATTER OF POST.

In the matter of the estate of CORNELIA POST.

Where a will directs the investment of a specified sum; that the income thereof be paid to the life-tenant and that at his death the principal be divided among certain named persons in specified shares, the remaindermen in such case take a vested remainder at the death of the testator, and in case of the death of any one of the remaindermen prior

to that of the life-tenant the personal representatives of such deceased remaindermen are entitled to his share upon the death of the life-tenant.

Where in such case the executor under testator's will has died before the distribution of the remaindermen's shares, such shares should be received and distributed by an administrator c. t. a. of the testator and not by the executor of the deceased executor.

The statute, L. 1882, chap. 185, providing that in case of the death of the surviving trustee of an express trust, the trust shall devolve on the Supreme Court, does not apply in such case, as the statute relates solely to the case where one being a trustee, as contradistinguished from an executor merely, dies leaving the trust unexecuted.

An action for an accounting may be maintained to obtain an administration of the estate of a testator, against the executor of a life-tenant to whom letters c. t. a. had been issued and the assets of the testator delivered less than six years before the commencement of the proceeding for the accounting. And this is not changed by the fact that the issuing of letters testamentary, to the executor since deceased, of the original testator took place eleven years before the institution of such proceedings.

PROCEEDING by the administratrix c. t. a. of Cornelia Post, deceased, against the administrator of Edwin Post, deceased, for an acccounting.

DANIEL G. ROLLINS *and* JOHN C. O'CONNOR, JR., *for the petitioner.*

F. W. HINRICHS *and* GEORGE D. BEATTYS *for respondent.*

THE SURROGATE.—The referee has reported that this proceeding should be dismissed. The petitioner excepts to this conclusion of law and to the grounds upon which the referee bases it. They are, first, the inability of petitioner to maintain the proceeding in the capacity in which she has brought it, to wit, as administratrix with the will annexed; second, that the right to compel the accounting sought is barred by the Statute of Limitations. As an additional ground for sustaining the disposition made by the referee, the respondent insists that all those who were

ultimately entitled to share in the principal of the fund in question had received their entire interest and that therefore, and as there are no unpaid creditors, there is no estate for the petitioner to administer. The last claim involves the question as to whether or not certain specified legatees, to whom a portion of the fund was given after the death of the life beneficiary, and who pre-deceased the latter, but survived the testatrix, were entitled to a vested interest therein. The testatrix died June 22, 1873, leaving a will and appointing an executor and executrix who, after the admission of the will to probate, July 10, 1873, took out letters testamentary, the former on July 10, 1873, and the latter April 13, 1876. One of the executors died in July, 1879, and the other December 9, 1881. The will contained, among other provisions, the following:

"I order and direct that my executors invest the sum of $20,000 upon bond and mortgage of real estate or such stocks as they may regard as safe and permanent, and to pay over the interest and income thereof as the same may be received to my husband, Edwin Post, for and during his natural life; and upon his death, out of the principal of said trust fund, to pay to Jane Eliza Davis, daughter of Elijah Davis the sum of $5,000; and after deducting said sum of $5,000 to divide and pay over the remainder of said trust fund unto and among my sister, Emily Bell, and my brother, Gilbert T. Davis, in equal shares."

On May 16, 1883, letters of administration c. t. a. were issued to the husband of the testatrix, the life beneficiary mentioned in the foregoing provision.

Subsequently to his appointment, and in pursuance of two orders of the Surrogate, dated respectively July 19th and 20th, 1883, directing the transfer thereof to the said administrator, there were delivered to him a certain certificate of deposit belonging to the estate of testatrix, then held by the executors of one of the executors of testatrix, and certain bonds and mortgages, also belonging to said estate, and formerly in the possession of the executor of a deceased agent of testatrix's executors. These are the funds respecting which an accounting is sought. The said administrator died June 9, 1887, and letters of administration upon his estate were issued to the respondent, August 25, 1887. The petitioner, who was appointed administrator c. t. a. of the testatrix began this proceeding January 12, 1888, to compel the respondent, as administrator of testatrix's husband, to account for the administration of the latter of his wife's estate.

The first question presented is, whether the persons among whom the will directed a division of the fund upon the death of the life beneficiary took a vested or contingent interest therein. There is no doubt that they each took a vested interest not defeasible by the death of any of them in the lifetime of such beneficiary. Coit v. Rolston, 44 Hun 548; Da. Costa v. Bass, 48 Hun 31; Van Axte v. Fisher, 117 N. Y. 401; Smith v. Edwards, 88 N. Y. 104; Estate of Randall, Surr. Dec. 1890, p. 25.

Such being the case, the personal representatives of the two legatees who pre-deceased the life beneficiary are entitled to their legacies, and the petitioner, as administratrix c. t. a. of the testatrix, is entitled to

receive them for the purpose of administration and distribution unless for some other reason she is precluded from doing so.

It is claimed that the trust respecting the fund is of such a character that it could only be executed by a trustee appointed for the purpose, and not by an administrator with the will annexed. The provision containing the bequests in question, when considered separately or in connection with the rest of the will, evidences no intention on the part of the testatrix of reposing any such special or personal confidence or discretion in her executors as would dissociate the trust confided to them from their office as executors or prevent them from fully administering it. Hood v. Hood, 85 *N. Y.* 569–571; Mott v. Ackerman, 92 *N. Y.* 552–3; Matter of Clark, 5 *Redf.* 466; Bain v. Matteson, 54 *N. Y.* 663–4.

The claim that, pursuant to chapter 185 of the Laws of 1882, the execution of the provision in question devolved upon the death of the executors of the will upon the Supreme Court, is unfounded. The chapter cited relates solely to the case where one who, being a trustee, as contradistinguished from an executor merely, dies leaving the trust unexecuted. We have seen that the present is not a case of this character.

The question remains as to whether the petitioner is barred from maintaining the proceeding by the Statute of Limitations. It is to be noticed that the proceeding is not brought against the representatives of the deceased executors of testatrix. More than eleven years have elapsed since the issuance of letters

to the executor who last qualified and the commencement of this proceeding. If the proceeding had been begun against them, doubtless the plea of the bar of the statute would prevail. Matter of Van Dyke, 44 *Hun* 397; Matter of Clayton, 1 *Connoly Surr. Rep.* 444.

The attitude in which respondent's decedent stood with reference to the fund or property in question was that of having a claim therefor against the estates of those having possession of it. The representatives of such estates, having surrendered the property or fund to respondent's decedent within six years prior to the commencement of this proceeding, the attempt to interpose the Statute of Limitations to defeat the present proceeding is ineffective. Matter of Coman, 14 *St. Rep.* 937; See Leroy v. Bayard, 3 *Bradf.* 228; Warren v. Paff, 4 *Id.* 266–7; Paff v. Kinney, 5 *Sandf.* 380; House v. Agate, 3 *Redf.* 311.

The exceptions to the referee's report are sustained and the report must be referred back to the referee to proceed with the accounting.

ROCKLAND COUNTY.—HON. GEORGE W. WEIANT, SURROGATE.—March, 1890.

MATTER OF KANE.

In the matter of the application for the probate of the will of SARAH KANE, *deceased.*

One of the witnesses to the will of the decedent had drawn up the will in her presence. This instrument was spoken of by that witness in the hearing and presence of the other witness, and in the presence of the decedent immediately before the execution and attestation, as the will of decedent. She signed it with her mark. Upon the proceedings for the probate of the will the witness who had drawn up the will being dead, the other witness testified that he had signed the will as a witness before the testatrix had made her mark. *Held*, that the will must be admitted to probate, as there was proof of its due execution and attestation, as the testimony of the witness that he had signed before testatrix could be presumed to be erroneous, from the facts, which as appeared by the evidence, accompanied the execution of the will, showing that his recollection of the order in which it was signed was incorrect.

The subscription of a will by the mark of the testator may be proved after evidence of the handwriting of a deceased witness, by the surviving witness, if his testimony convinces the court of its truthfulness.

APPLICATION for the probate of the will of Sarah Kane, deceased.

The facts appear in the opinion of the Surrogate.

C. P. HOFFMAN, *for proponent.*

ARTHUR S. TOMPKINS, *for contestant.*

ANDREW TALLON, *special guardian.*

THE SURROGATE.—The only questions raised by the contestants relate to the proper execution of the will.

It is well settled that to entitle a will to be admitted

to probate, the statute must be fully complied with, and while courts have differed as to the interpretation, construction and application of the statute, they have agreed that the formalities and requisites thereof must be observed. The difficult question usually is, as to whether or not the facts bring the case within a substantial compliance with the statutory requisites.

Every last will and testament must be executed and attested in the following manner:

1. It shall be subscribed by the testator at the end of the will.

2. Such subscription shall be made by the testator in the presence of each witness, or shall be acknowledged by him to have been made by him to each of said witnesses.

3. The testator shall, at the time of making such subscription or acknowledgment, declare the instrument as subscribed or acknowledged by him to be his last will and testament.

4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator, 3 R. S. 63, (8th ed., p. 2547,) § 40.

Now, it is claimed by the contestants in this matter that the evidence does not establish a substantial compliance with the statute in the following particulars:

1. That the testator did not sign the will. 2. That if she did, she signed before the witness Horgan. 3. That she did not publish the paper as her last will and testament. 4. That the witness Horgan was not requested by the testator to become an attesting wit-

ness. 5. That the testatrix did not subscribe the will in the presence of the witness Horgan.

The subscribing witness Stephens is dead. His handwriting is proven, not only that of his two signatures as a witness, but also that the written portions of the will are in his writing. The attestation clause has recited therein a compliance with all of the above statutory requirements. He filled it out and signed his name to it. He was cognizant then of its contents, and having charge of the execution of the will, it must fairly be presumed that he saw that these requirements were followed. So far then as a deceased witness may speak, he attests a due subscription of said will by the testatrix and a full compliance with all other statutory requirements.

"A regular attestation clause shown to have been signed by the witnesses and corroborated either by the circumstances surrounding the execution of the instrument, the testimony of other witnesses to the fact of due execution, or other competent evidence has been held in many cases to be sufficient to establish a will signed by the testator even against the positive evidence of the attesting witnesses to the contrary." Matter of Will of Cottrell, 95 *N. Y.* 329–335.

The testimony shows that Stephens was a justice of the peace and had been one for a great number of years, and that as such he had experience in drawing wills which it is proper to infer includes also the conducting of the execution thereof. This was always considered to afford a strong presumption or compliance with the requirements of the statute in relation

to the execution of wills. Matter of Cottrell, *supra*, 339.

This presumption also prevails as to the order of observance of the requirements of the statute.

The testimony of the surviving witness, Horgan, as to the subscription by the testator, corroborative in some particulars, and as to such matters as he does not speak of, the presumption may fairly stand as unchallenged. Horgan testifies as to the signing by the testatrix as follows: "I saw her put her hand to the pen, and I could not say whether she wrote or not, but it is my belief she did write it, but I could not say. That is my impression. I saw the pen in her hand, and I saw her sit down to the table and put the pen upon the paper; she took hold of the pen." In answer to another question, he testified that he saw her sign her name to it.

The testimony of this witness also shows that when he went into the house of the testatrix on this occasion that the witness Stephens was at a table in one room with papers before him; that the testatrix was in an adjoining room with the door open; that the testatrix was called in; that the witness Horgan, was sitting at the table; that the testatrix came in by the table, and then signed as above.

I think that this testimony, in connection with the presumptions to which I have called attention, together with such reasonable inferences as may be indulged from an inspection of the instrument itself lead necessarily to the conclusion that the testatrix signed the will by making her mark where it appears at the end thereof, and in the presence of both witnesses. Wit-

nesses testify that all written parts of the instrument, including the attestation clause and the words "her" above and "mark" below the cross mark are in the handwriting of the witness Stephens. The witness Horgan saw the testatrix writing on the instrument; if so, then it seems that she must have necessarily made the mark.

But it is claimed that the testator signed her name after the witness Horgan. Horgan does so testify. I think, however, he is mistaken. The presumption is otherwise. He testifies that the witness Stephens signed once before him. I am quite positive that he is in error. I have examined the overlapping parts of the signatures with a magnifying glass, and such an examination shows very clearly that both of Stephens' signatures were made before those of Horgan. This shows that Horgan's recollection of the particulars and the order of their occurrence after the lapse of so many years may be somewhat obscured and incorrect.

He signed twice, once opposite the testatrix's signature, and a second time beneath the attestation clause. Now, if it were true that he signed before the testatrix, then he must have signed his name opposite the place of the testatrix's signature, when that place was blank, which is rather an unreasonable thing for him to have done, or that he should have been asked or permitted to do by one having experience in the execution of legal documents, such as Stephens had. Matter of Look, 1 *Connoly Surr. Rep.* 403. The signature of the testator, preceding that of the witness in point of space is presumed to have been

made first in point of time. Matter of McMulkin, 6 *Dem.* 347.

As to publication by the testatrix of the instrument in question, and the request that Horgan should become an attesting witness, I am of the opinion that the evidence shows a substantial compliance with the statutes. Upon proof of the signature of a will, and an attestation clause full in its recitals of compliance with the statute, as in this case, the presumption of due execution would carry the will to probate in the absence of any recollection of the circumstances by the surviving witness. Matter of Pepoon, 91 *N. Y.* 255. Now, I do not find anything in the testimony to overthrow this presumption, while, on the contrary, in some particulars, I find evidence confirmatory of the same.

The witness Horgan testifies that George Kane, the son of the testatrix, came to the store of the witness and asked him if he would come up and be a witness to his mother's will; that she was to make a will, and she asked him "to come down and see if I would come up . . . . . 'the squire is at the house now.' He came down a second time, and I went up with him. When I got there, the squire, Peter Stephens, was there in the front room. He had papers before him, and Mrs. Kane was in the inside room. I went into the room where Squire Stephens was sitting. Everything was ready. I just sat down . . . . . he said: 'I sent for you to be present at the signing of the will,' and he called for Mrs. Kane, and she came out of the room and he said: 'Mrs. Kane, you heard this will read,' and she said, 'Yes,' and he said: 'Sign

it,' and I signed it, and said, 'Mrs. Kane, you sign it,' and she signed it, and I left."

"You were asked to sign it by Mr. Stephens?" "Yes sir." "Did Mrs. Kane say anything about it?" "Not a word that I remember. He asked us to sign it, and we did." Q. "And she did not ask you to sign it as a witness?" A. "Mr. Stephens did, I don't think she did." I saw Mrs. Kane in the adjoining room, the doors were all open." Q. "So you could hear any conversation between persons in the two rooms?" A. "Yes sir." Q. "Squire Stephens told you what you were wanted for there?" A. "Yes sir. Well, he said simply, 'Mr. Horgan, sign this will. Witness this will.' I understood it was Mrs. Kane that wanted me to do it. The next thing, Squire Stephens called for her to come into the room and he said to her, or he asked her, 'Mrs. Kane, you have heard this will read?' She said, 'Yes sir,' she had heard it read, and Mrs. Kane came in by the table where Squire Stephens was sitting. He (Squire Stephens) said, 'Mrs. Kane, we are ready for you to sign it now.'"

Then the execution and attestation, immediately followed. This testimony, with other facts and circumstances in evidence, together with the presumptions arising from the recitals in the attestation clause of publication and request, and from the fact that the execution of the will was conducted by one having knowledge of the requirements of the statute to constitute a due execution, establish a publication and request that satisfies the legal requisites.

No particular form of words is required to constitute a due publication and request. Matter of Hunt, 110

N. Y. 278. It is a substantial compliance with the statute if, in some way or mode, the testator indicates that the instrument the witnesses are requested to subscribe as such is intended and understood by him to be his executed will. *Id.*

The legislature only meant there should be some communication to the witnesses indicating that the testator intended to give effect to the paper as his will, and that any communication of this idea or to this effect will meet the object of the statute; that it is enough if in some way or mode the testator indicates that the instrument the witnesses are requested to subscribe as such is intended or understood by him to be his will. The word "declare" is said to signify "to make known, to assert to others, to show forth," and this in any manner, either by words or acts, writing or in signs, in fine, that to declare to a witness that the instrument described was the testator's will must mean to make it at the time distinctly known to him by some assertion or by clear assent in words or signs. Lane v. Lane, 95 *N. Y.* 494–498. And publication and request may be incorporated in the same words and acts. Coffin v. Coffin, 23 *N. Y.* 9.

Within these authorities and the construction there given to the statutes I have no hesitation in arriving at the conclusion that the evidence shows a due publication of the will and a request to the witnesses. The witness Stephens, at the request of the testatrix, drew the will, and in her presence. The instrument thus prepared was spoken of by Stephens to her and in the presence and hearing of the other witness when all three were present and immediately preceding its

execution, and attestation, thus showing beyond a doubt that the paper she signed was known to her at the time to be her will, and that she intended giving it effect as such. The witness Stephens in this matter must be deemed to have been her agent in all that he did, in the preparation and execution of this will. The evidence calls for the finding of such authority. His request to the witness Horgan, and whatever else he said to that witness in the presence of the testatrix or that may reasonably be inferred to have been said or done in her presence in reference to the will or as to his becoming a witness, thereto should be considered as said or done by her.

The words of request or acknowledgment may proceed from another and will be regarded as those of the testator, if the circumstances show that he adopted them and that the party speaking them was acting for him with his assent. Gilbert v. Knox, 52 *N. Y.* 125.

Upon the entire proof in the case, and guided by the authorities giving construction to the statute, as also by those establishing inferences and presumptions and touching the force thereof as connected with the execution and attestation of wills, I am convinced that a fair and substantial compliance with the statutory requirements has been shown and that the instrument should be held to have been duly executed, published and attested as the will of the testatrix.

The cases cited by the contestant's counsel are not in conflict with this conclusion, as each is distinguishable upon the facts and circumstances.

In the matter of McMulkin, 6 *Dem.* 347, there was no attestation clause. In the Matter of Sarauw, 2 *N.*

Y. Supp. 629, the persons having charge of the execution of the will were inexperienced in the matter of wills, and I think it may be inferred that there was no attestation clause. In Walsh v. Laffan, 2 *Dem.* 498, the paper was not referred to as a will by the testatrix, or by either of the witnesses, nor did either of the three use words or expressions asserting or even intimating that the instrument was of a testamentary character. In the Matter of Booth, 24 *N. Y. St. Rep.* 647; 6 *N. Y. Supp.* 41, the will was executed in New Jersey, where a will is not required to be subscribed or signed at the end thereof. It was sought to establish the will by proving the name of the testatrix in the first line of the instrument as an execution thereof.

But, notwithstanding I have reached the conclusion that the evidence establishes a due publication, execution and attestation of this will, the counsel for the contestants claim that the testatrix having subscribed the will by mark, the will cannot be admitted to probate (one of the witnesses being dead) without the testimony of another witness who saw the testatrix make her mark, and confronts me with authorities which appear to sustain his contention. He cites matter of Walsh, 1 *Tuck.* 132; Matter of Reynolds, 4 *Dem.* 68; Matter of Phelps, 1 *Connoly Surr. Rep.* 463; Worden v. Van Gieson, 6 *Dem.* 237. That is not my understanding of the law, and as far as my observation has gone, it is contrary to the usual practice.

If it be true that no will signed by mark can be admitted to probate without the testimony of two witnesses who saw the testator make the mark, then very

many wills so signed must and will fail of probate, for it is a matter of frequent occurrence that one of the subscribing witnesses is dead or beyond the reach of the court, and it is usually the case that no other persons are present at the execution of a will than the testator and attesting witnesses.

Such a construction of the statute applies one rule to wills subscribed by a testator who can write and another to one who cannot do so. This should not be the case, unless clear words to that effect appear in the statute. The statute makes no such distinction, and there are no words therein that will authorize such a construction. The rule is uniform as to all written wills, however subscribed.

Section 2620 of the Code of Civil Procedure provides: "If all of the subscribing witnesses to a written will are, or if a subscribing witness whose testimony is required is dead or incompetent by reason of lunacy or otherwise, to testify, or unable to testify; or if such a subscribing witness is absent from the state, or if such a subscribing witness has forgotten the occurrence or testifies against the execution of the will, the will may nevertheless be established upon proof of the handwriting of the testator, and of the subscribing witnesses, and also of such other circumstances as would be sufficient to prove the will upon trial of an action."

This section received a practical construction in Brown v. Clark, 77 *N. Y.* 369; Matter of Pepoon, 91 *Id.* 255; and Matter of Cottrell, 95 *Id.* 329, and was held to mean, in accordance with prior decisions cited, "that the proof of circumstances bearing upon the

question of the authority of the will in connection with a regular attestation clause duly executed were, if sufficient to satisfy the court of its genuineness, all that was required to sustain the probate of the will." Matter of Hesdra, 119 *N. Y.* 615, more fully, 28 *St. Rep.* 810.

If the word "handwriting," as used in section 2620 above, is to receive the narrow construction of meaning one who can write, then as already stated, almost every will signed by mark, where a subscribing witness is dead, must fail of probate, and we shall have one rule as to written wills signed by one who writes his name, and another as to such wills as are subscribed by one who makes his mark.

I am not disposed to adopt such a construction. It is my opinion that the word "handwriting" signifies, as here used, the subscription of the testator to the will, whether it be by writing or otherwise. It implies the characters by which he subscribed the will. When this provision of the Code was enacted, it was established as unchallenged law that a will could be legally subscribed by mark as well as by writing the name (Jackson v. Jackson, 39 *N. Y.* 153), and if any distinction was intended, dependent upon the method of subscription or signing, the legislature would have so clearly provided.

Nor is there any force in the criticism that a mark does not permit of identification, and therefore there can be no proof of the handwriting where a witness can testify to having seen the mark made. Cases may arise where a will might fail of probate in the event that no witness can be produced to testify to

having observed the mark made, but it is not a failure to prove the handwriting where any witness is produced who saw the subscription by mark.

It surely is proof of a testator's handwriting when a witness testifies to having seen it made, and it is generally more satisfactory and convincing than when testimony is given as matter of opinion by one who did not observe the writing done.

In making provision for the establishing of a will in cases arising under section 2620 of the Code, the Legislature imposed no limitation or restriction as to the method by which or witnesses by whom the "handwriting" might be proven. These were left to the general rules of evidence, and the qualifications of witnesses as embodied in the common and statutory law. I am unable, therefore, to understand why a surviving, attesting witness may not establish the subscription of a will by a testator where he sees the signing done, if his testimony convinces the court of its truthfulness, and as well where the signing by the testator is by mark as by writing his name.

Now, if the authorities cited by the contestants' counsel are sound, then this will must fail of probate, even though a subscribing witness testifies to having seen the subscription made, and yet had the execution been by a testatrix who could write her name, upon the same evidence the will could be lawfully admitted to probate. Such a construction of the statute should not be adopted as would incorporate therein such a distinction. An interpretation of the statute that requires proof of the signing by mark from some person other than a subscribing witness where as here one of

the attesting witnesses is dead, is equivalent practically to requiring an execution of such a will before more than two witnesses, in order to secure its probate, and this the statute does not require.

The conclusion at which I have arrived has not been reached without hesitation, as it appears that the same is adverse to that of learned and experienced Surrogates. From the report of the case of Matter of Reynolds, 4 *Dem.* 68, however, it does not appear that the surviving attesting witness gave testimony of his having observed the testator make his mark, and the authority may not therefore be adverse.

The following authorities sustain the construction which should be given to section 2620 of the Code that I have adopted. Matter of Simpson, 2 *Redf.* 29; Matter of Dockstader, 6 *Dem.* 106.

Let a decree be entered admitting the will to probate with costs to the proponent.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—March, 1890.

MATTER OF UNDERHILL.

In the matter of the estate of EDWARD B. UNDERHILL, *deceased.*

A legacy of five hundred dollars payable one year from the date of letters testamentary is not subject to the collateral inheritance tax, as its cash value is less than five hundred dollars.

MATTER OF UNDERHILL.

A legacy to an institution for the blind which does not under any circumstances receive pay from its patients is exempt from the collateral inheritance tax.

A legacy to a creditor upon condition that he accept the same as payment in full of all unsettled accounts and claims held by him against testator, such accounts and claims being somewhat in excess of the amount of the legacy, is not subject to the collateral inheritance tax.

APPRAISEMENT of the estate of Edward B. Underhill, deceased, for the purpose of fixing the value of certain legacies claimed to be subject to the collateral inheritance tax.

The appraiser appointed herein to fix the fair market value of certain legacies claimed to be subject to taxation under chap. 713 of the Laws of 1887, has among other things reported the value of the following legacies thus:

Abraham S. Underhill, and two others, as executors, in addition to their legal commissions and expenses, each . . .	$500.00
The New York Institution for the Blind	$500.00
The American Society for the Prevention of Cruelty to Animals . . .	$500.00
The N. Y. Soc. for the Prevention of Cruelty to Children	$500.00
Henry C. Kear	$4,000.00

The question arises as to whether these several legacies are subject to the tax.

R. H. UNDERHILL, *for the executors.*

PLATT & BOWERS, *for New York Institution for the Blind.*

THE SURROGATE.—There were three executors named in the will, all of whom qualified. To each of those who should qualify and act the testator be-

queathed five hundred dollars, over and above his legal commissions and expenses, one half of which sum was made payable one year after he should have qualified as such, and the other half on the final accounting, which could not, by reason of the provisions of the will, occur in less than seven years. Section three of the act provides for a case where a bequest is made *in lieu* of commissions; but these bequests are given in addition to them and are not, therefore, within the purview of that section. As the sum is only five hundred dollars to each and is not made payable immediately, but such payment is postponed, as stated, the present cash value is less than five hundred dollars, and thus all are exempt from the tax.

The bequests of five hundred dollars each to the several charitable institutions, are also exempt because payable at the end of a year from the date of the letters testamentary, and the cash value therefore is less than five hundred dollars, as recently held by me in the Matter of Peck, 2 *Connoly Surr. Rep.* 203. The legacy to the institution for the blind is claimed to be also exempt on the ground that it does not receive pay from patients under any circumstances. This is alleged on its behalf and is not controverted. Hence it is exempt as an almshouse, under subd. 4, sec. 1, title 1, chap. 13, part 1, Revised Statutes.

The testator bequeathed to Henry C. Kear, his foreman, who had for many years managed several large farms of his, the sum of four thousand dollars, payable as soon as might be after testator's decease, upon condition that he should accept the same in full of all unsettled accounts and claims against him, other than

the amount of any note or notes he might hold. It was made to appear that the amount of Kear's claim for services was, exclusive of any such notes, somewhat in excess of the sum bequeathed, but that he was willing to accept the legacy in full. Had no bequest been made in this form, but Kear's claim had been left in the class of "all my just debts," which a testator usually directs his executors to pay, it would certainly have been exempt from taxation. If he had simply bequeathed $4,000 without the mention of any claim, then it would have been taxable. Where a testator chooses to provide, in the form of a bequest, for the payment of a just debt, with a view possibly of obviating any question in the minds of his executors as to its amount or validity, he could do so with great propriety; but by doing it he could not clothe it with the character of a gift. Under the circumstances it will readily be seen that, by this provision of the will, no property is "transferred by deed, grant, sale or gift," as contemplated by the 1st section of this act, to Kear. He simply designates the mode of payment of a debt. It is accordingly held to be exempt from taxation under the act.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—March, 1890.

MATTER OF LANE.

In the matter of the judicial settlement of the account of WILLIAM F. LANE *and* JAMES F. MEE, *as administrators of the estate of* MICHAEL LANE, *deceased.*

Where after the death of an intestate, one of the next of kin dies, and no administrator of such next of kin has been appointed, the administrator of the intestate must hold the share of the deceased next of kin until some one entitled to receive it shall appear and then it must be the subject of a further accounting by the administrator.

ACCOUNTING of administrators of the estate of Michael Lane, deceased.

JOSEPH E. OWENS, *for administrators.*

THE SURROGATE.—The intestate died leaving as his next of kin, among others, Margaret Lyons, a married sister, residing with her husband and children, in London, England. Since then, Mrs. Lyons has died leaving her husband and children surviving. She is said to have died intestate and no one has been appointed to administer her estate. The administrators of Lane have, among others, cited the husband and children to attend their accounting, none of whom appeared, except a special guardian appointed for the minors. No objection was made to the account. A decree is

presented for signature, and the only question is what disposition shall be made of the share of the late Mrs. Lyons, which amounts to about $334. The proposed decree provides that it shall be paid to her administrator when appointed, and in the event that it shall not be so paid at the expiration of two years from the date of the decree, it be paid to the treasurer of Westchester county.

Section 2743 of the Code provides that when the account has been judicially settled, and there remains a sum to be distributed to the creditors, next of kin, etc., the decree must direct the payment and distribution thereof to the persons so entitled. Of course, the decree cannot direct payment except to some person, and it cannot direct payment of the share in question to the husband and children, because it belongs to the estate of the deceased wife, and that must be administered in a proceeding by itself. If there were an executor or administrator of her estate, the decree should direct it to be paid to him as a person entitled to receive it as a part of the estate he would represent. At present then there is no person to whom the share can be decreed to be paid.

Section 2748, following up the idea of distributing the estate as above directed, enacts that the decree must direct the administrator to pay to the county treasurer a distributive share which is not paid to the person entitled thereto, as fixed by the decree at the expiration of two years from the time when the decree is made, or the share is payable by the terms of the decree. As there is no person or legal representative in existence, to whom this share can be decreed

to be paid, there can be no provision made for its payment to the county treasurer. Nor can it be paid to the state treasurer under the provisions of section 2747, which enacts that it shall be so paid when the person entitled to it is unknown. The latter word itself presupposes the existence of such a person, while, as has been shown, there is none. If a legacy were directed to be paid to issue of a person named, and such issue existed, but were unknown, then this section would have application.

This would seem to be a *casus omissus*. There can be discovered no other course open than to direct the administrators to hold this share until some one entitled to receive it, shall appear and then it must be the subject of a further accounting by the administrators.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE—February, 1890.

MATTER OF HAMILTON.

In the matter of the application for the probate of the will of ALEXANDER HAMILTON, *deceased.*

Where it is sought to set aside and revoke or vacate a decree admitting to probate a will of personal and real property, the proceeding must be taken under subdivision 6 of section 2481 of the Code of Civil Procedure, which authorizes the Surrogate to open, vacate, modify or set aside in certain cases a decree of his court.

Such application when made upon the ground of the discovery of a later

will, should be made on proper affidavits and should pray for an order that the decree be vacated and that all persons interested may be cited to show cause why such order should not be made. The citation should be directed, not only to the heirs at law and next of kin who were cited to attend the probate, but also to the legatees, if any, who did not belong to either class and were not required to be cited. Upon the return day, if the proofs are sufficient to justify it the decree will be set aside, and the later will, if sufficiently established, admitted to probate.

The provisions of sections 2647 *et seq.* of the Code do not apply to the revocation of such a will, as they relate exclusively to wills of personal estate only.

APPLICATION for the revocation of the probate of a will of real and personal property.

A will and codicil of the deceased were duly admitted to probate on the 20th day of January last, and letters testamentary issued to the executors. Shortly thereafter there was discovered, among the papers of the deceased, a will bearing a subsequent date, which, among other things, contained a provision revoking the will and codicil so admitted; whereupon a question arose as to the proper method to be pursued to cause a setting aside of the decree by which they were admitted to probate.

OGDEN, BEEKMAN & OGDEN, *for petitioners.*

THE SURROGATE.—Before the enactment of the present Code, it had been held that the Surrogate had, among his incidental powers that of setting aside and vacating a decree admitting a will to probate, on the discovery of a will of later date, but the mode of procedure to reach such a result, was not then, nor is it under the present Code, very distinct, nor am I aware of any settled practice upon the subject now

subsisting. It would seem, however, that an application should be made upon proper affidavits, under subdivision 6 of section 2481 of the Code, which authorizes the Surrogate to open, vacate, modify or set aside, in certain cases, a decree of his court, praying for an order that the decree be vacated, and that all persons interested might be cited to show cause why such order should not be made. The citation should be directed not only to the heirs at law and next of kin who were cited to attend the probate, but also the legatees, if any, who did not belong to either class and were not required to be cited. By the admission of the will to probate such legatees at once became parties in interest, whose rights could not be affected except upon notice. The later will may not have made them legatees at all; and it may have materially affected the rights of the heirs at law and next of kin as fixed by the prior one. On the return day of the citation if there were no opposition, or if there were, and the proper facts stated in the petition and affidavits were established and deemed sufficient to justify it, an order would be made setting aside the decree, provided the later will should be sufficiently established to warrant its admission to probate. Then, in case it would not be, the original decree would stand.

If the order prayed for were granted as suggested, then the usual proceedings would be had to prove the later will. If successful, it would, as above stated, operate to make the order of revocation final; if, on the contrary, it failed, the original decree would remain of full force.

It is insisted, however, by the counsel for the executors that a proceeding for the revocation of probate may be instituted under article second, chap. 18 of the Code (section 2647). The history of that article seems to be as follows: Under the 2 R. S. 61, §§ 30, 31, etc., and under the Laws of 1837, chap. 380, as embodied in 3 R. S. 142, § 24, etc., (5th ed.,) a proceeding of that character was confined exclusively to the revocation of wills of personal property, but it was held, in the Matter of Kellum, 50 *N. Y.* 298, that where the probate related to a will of both real and personal estate the Surrogate had power to revoke it as to the personal estate only, while it would stand as a will of real estate. The section of the Code referred to was originally reported by the commissioners provided for proceedings for the revocation of probate, without confining it to a will of personal estate only, thus seeking to avoid the ruling in the Matter of Kellum, *supra*, but the legislature saw fit to add the words "of personal property" after the word "will" and so, in that respect, leaving it as it stood under the act of 1837 and the decision above referred to. As this will relates to both real and personal estate, the desired result cannot therefore be attained under a proceeding of that character, and the only remedy is to be found under section 2481. The course indicated should be pursued in this instance.

ALLEGANY COUNTY.—HON. McARTHUR NORTON, SURROGATE.—March, 1890.

MATTER OF STERNS.

In the matter of the estate of JOHN STERNS, *deceased.*

The executor of a will, who is the chief beneficiary thereunder, whose relations with most of the testator's heirs and next of kin are unfriendly; who has large unsettled transactions with the estate, and who is charged by the contestants, having exercised undue influence over the testator, should not be appointed temporary administrator, pending the contest of the will.

APPLICATION for the appointment of a temporary administrator during the pendency of a contest of the will of John Sterns.

HAMILTON WARD, *for proponents.*

DOLSON & ORCUTT, *for contestants.*

L. C. VAN FLEET, *special guardian.*

THE SURROGATE.—The will, the subject of this contest, gives to a son, the executor named therein, the principal part of the estate of the decedent, charging him with the maintenance of the widow, the payment to her of a small annuity, and the payment of some inconsiderable legacies to the other heirs of the decedent. All the parties interested, except the executor and the widow, are contesting the probate of the will, and all concede the necessity of the appointment of a temporary administrator; the proponents urging the

appointment of the executor, while all the contestants object, and urge that some disinterested man should be named. The contest has developed considerable bitterness, and the position of the contending parties towards each other is that of extreme hostility; but no evidence of any incompetency or unfitness, has been given, so we are led to an examination of the authorities bearing on this question. In the case of Crandall v. Shaw, 2 *Redf.* 100, it was held to be improper to appoint a person who was a party to the litigation, although he was not personally interested in the result, and that none but a disinterested person should be named. The same had been held in a prior case, Mootrie v. Hunt, 4 *Bradf.* 173, and the former case followed the holding of the latter. In the case of Howard v. Dougherty, 3 *Redf.* 535, it was held that an executor of an estate should not be appointed, where he has any hostile interest. The court says "a collector and receiver represents the interests of the respective legatees, if the will shall be admitted to probate; but, in case of rejection, he represents the heirs and next of kin, and should not be appointed, when it is apparent that, in respect to the probate of the will, he is in hostility to any party that he must thus represent, except upon consent of the respective parties, or for some very special reason rendering him indispensable in the proper administration of the estate." The case of Cornwell v. Cornwell, 1 *Dem.* 1, was decided on the authority of the case last cited; the court there saying that he had several times held in accordance therewith, and holding that the appointment of an executor charged with unduly influencing the tes-

tator should not be made. The holding of the courts seems to have been uniform in refusing to appoint an executor pending a contest in which he is largely interested, and where he is in a hostile position to, and his appointment is opposed by the contestants. An examination of the later cases show that they do not differ from this view. In the case of Jones v. Hammersley, 2 *Dem.* 286, the executor was not personally interested in the estate, and his appointment was opposed on the sole ground that he was named as executor, and the court in the case said: "Where an application for the appointment of one named as an executor has been opposed on account of his unfriendly relations with the contestants, or of his alleged undue influence in shaping the testamentary dispositions of the decedent, or for some like cause, such application has often been denied." But where the only ground of opposition is the fact that he will be entitled to letters testamentary if the paper in dispute shall be established as a will, he should be appointed. That case does not seem to change but reaffirms the rule. The case of Haas v. Childs, 4 *Dem.* 137, was where the widow applied for temporary letters and only one person objected, and his interest was small, and he the only contestant of the will. Considerations of economy induced the court to grant letters to her. The Matter of Bankard, 19 *Weekly Dig.* 452, does not vary the rule, but holds that there is no arbitrary principle or provision of law preventing the appointment of a person named as executor in a will over which there is a contest. There seem to be no cases reported where, under the circumstances of the mat-

ter before us, the executor has been appointed the temporary administrator. He is the largest beneficiary under the provisions of the will, is the main proponent, is charged by the contestants with having influenced the decedent, and also that he has now large unsettled transactions with the estate, and the relations existing between him and the other members of the family are of a very unfriendly character. It is true the widow is in sympathy with him in this matter, but this does not overcome the settled rule, particularly as the portion to which she would be entitled should the will not be established, will be greater than the amount provided for her therein. So, in any event, she must be as well provided for. Following the long established precedents, I am constrained to come to the conclusion that under the circumstances, the appointment of the executor named in the will would not be proper, and for the same reason the widow should not be appointed. The parties to the contest may agree upon some person to receive the appointment, and if they are unable so to do, the court will appoint. A bond in the sum of $20,000 will be required.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—April, 1890.

MATTER OF RICHARDSON.

In the matter of the estate of BENJAMIN RICHARDSON, *deceased.*

A petition to the Surrogate for leave to compromise a claim must contain all the facts and circumstances warranting an acceptance of a less sum than the face of the claim, before the compromise will receive the sanction of the Surrogate. The same evidence should be before the Surrogate on this ex parte application that would be required to justify the same if attacked upon an accounting.

APPLICATION by W. T. Washburn, one of the executors of the will of Benjamin Richardson, deceased, for leave to compromise a claim due to the estate.

W. G. WOOD, *for the executor.*

THE SURROGATE.—This is an application by one of the executors of the will of deceased for leave to compromise a claim due the estate. The claim is for a deficiency arising out of a foreclosure sale of real property. In his lifetime the deceased commenced an action against the defendant for the deficiency, which is now pending.

The petition alleges that "petitioner, after a thorough examination of the questions involved in the suit and the responsibility of the defendant therein, and upon the advice of his attorney," is fully satisfied

that it is for the interest of the estate to accept the compromise. The affidavit of the attorney is attached, in which he says that he has examined the questions involved and considered the probability of collecting a judgment against the defendant, if any should be obtained, and from such information he is satisfied it will be to the advantage of the estate to accept the compromise.

The statute authorizing the application to the Surrogate provides for the approval of the compromise "on good and sufficient cause shown therefor" (4 Rev. Stat., 8th ed., p. 2563). The compromise thus effected does not deprive any party interested in the estate from showing on final settlement of the accounts, that such debt or claim was fraudulently or negligently compromised, and the same evidence should be before the Surrogate on this ex parte application as would be required to justify the same if attacked on an accounting.

In the present proceeding, no facts are stated, beyond the existence and status of the debt, and its nature, and that one of the executors and the attorney in the suit believes the compromise to be advantageous; the facts and circumstances leading them to that conclusion are not stated, and the Surrogate is called upon to ratify their judgment without knowledge as to its foundation.

The statute provides for the judgment and opinion of the Surrogate, and he must be fully informed of all the facts and circumstances warranting the acceptance of a sum less than the face of the claim before the compromise will merit or receive his indorsement.

If the defendant is insolvent, that fact should be stated, and any circumstances establishing same. If the reason for the compromise is the unsettled state of the law making the prosecution of the claim hazardous, or for any other cause the successful termination of the suit is doubtful, full information should be furnished on that subject.

The Surrogate is frequently called upon to authorize the compromise of actions brought by personal representatives of decedents to recover damages for occasioning their death. This class of compromise applications exceeds all others in number. In such cases the evidence in the possession of plaintiff should be set forth in detail. The consent of parties interested in the fund should be furnished where obtainable, and in all such cases the interest of the attorney in the result of the litigation, and whether contingent, should be mentioned.

I have considered this application in detail and at greater length than the particular case requires, for the reason that these applications have of late greatly increased in number, and I am almost invariably compelled to return the papers to counsel in order that information of the character herein indicated may be supplied.

Application denied.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—April, 1890.

MATTER OF MACOMBER.

In the matter of the estate of SARAH MACOMBER, *deceased.*

Where the Statute of Limitations has not barred the claim of an executor or administrator at the time of decedent's death, its running will be suspended until the first judicial settlement of the account of the executor or administrator.

The rule that the burden of proving payment is upon the party alleging it, applies to the litigation of a claim against the estate of a decedent upon a promissory note made by such decedent, to which the defence of payment is interposed.

ACCOUNTING of an executor.

The facts appear in the opinion of the Surrogate.

EDWARD E. SPRAGUE *and* FRED INGRAHAM, *for the executor.*

WILLIAM J. GAYNOR, *for* MARY L. O'FLYN.

FREDERICK G. DOW, *for* GEORGE POWERS *et al.*

THE SURROGATE.—The evidence sustains the report of the referee, and unless there is something in the questions hereinafter considered that requires a different disposition of the case, the report should be confirmed. It is insisted by the contestant that certain debts, which the executor claims the testatrix owed him at the time of her death, and which he is seeking to prove upon this proceeding for the first judicial settlement of his accounts, were barred by the

Statute of Limitations. Fourteen years have intervened between the date of the death of the testatrix and the initiation of this proceeding. None of the claims in question were barred at the time of testatrix's death. Prior to the amendment of section 37, chapter 460 of the Laws of 1837, by chapter 594 of the Laws of 1868, the statute ran against a debt due the representative of the estate, as well as against that of any other claimant. Matter of Rogers, 1 *Redf.* 231; Burnett v. Noble, 5 *Redf.* 73–4; Boughton v. Flint, 74 *N. Y.* 476.

By the act of 1868, and section 2740 of the Code of Civil Procedure, which superseded that act, if the statute had not barred the claim or demand of an executor or administrator at the time of decedent's death, its running was suspended until the first judicial settlement of the account of the executor or administrator. See Estate of Willard, 29 *St. Rep.* 949.

The executor, therefore, was not prevented from proving his claims on the present accounting. One of the claims in question is upon a promissory note made by the testatrix. It is contended by the contestant that the burden of proof as to the non-payment thereof rested upon the executor. Payment is an affirmative defence which the party alleging it must prove or establish. Eagan v. Kergill, 1 *Dem.* 466; McKyring v. Bull, 16 *N. Y.* 297.

Especially is this so where the claimant is, as in this instance, precluded from personally giving the proof. Lerche v. Brasher, 104 *N. Y.* 157, 161.

The power of sale conferred on the executor, although doubtless a discretionary one, is sufficiently

general in character to admit of the application of the proceeds of the real estate sold pursuant to it to the payment of decedent's debts. Erwin v. Soper, 43 *N. Y.* 521, 525.

Of the jurisdiction of the court to entertain or compel an accounting for such proceeds, there can be no doubt. Sec. 2724, subd. 4, Code Civ. Pro.; Estate of Cutting, *Surr. Dec.* 1885, p. 347; Daily Register, Nov. 18, 1885.

The referee's report is confirmed.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—April, 1890.

MATTER OF STEWART.

In the matter of the estate of CORNELIA M. STEWART, *deceased.*

A person who takes a legacy under the exercise of the power of appointing legatees given to a trustee by a will, takes as by the will when such power is exercised by the trustee, and if his legacy is subject to the collateral inheritance tax, it is taxable at the time of the exercise of such power.

Where such appointment of a legatee is made more than eighteen months after the decedent's death, interest on the tax will be at the rate of six per cent from the death of decedent to the time of the entry of the order confirming the appraisement. If such tax and interest is not then promptly paid, interest thereon will run thereafter at the rate of ten per cent.

HORACE RUSSELL *and* JABISH HOLMES, JR., *for the executors.*

A. W. EVARTS *and* WILLIAM G. CHOATE *for* ROSALIE BUTLER.

MARTIN & SMITH, *for* SARAH N. SMITH.

WILLIAM T. GILBERT, *for the cathedral.*

BENJ. F. DOS PASSOS, *for the comptroller.*

MATTER OF STEWART.

THE SURROGATE.—Mrs. Stewart died on the 5th day of October, 1886, and by her will and codicils thereto left one half of her residuary estate to Henry Hilton, as trustee, with power of appointment to and among such of the legatees and in such proportions as he might see fit. On January 16, 1890, he made such appointment among certain of the legatees, whose property in the estate in virtue of such appointment is liable to the tax. The appraiser, who had been appointed prior to the exercise of the power of appointment, did not report until after it had been exercised, and included in his report as subject to the tax, the amount apportioned to the legatees by the trustee acting under his power.

It is claimed by counsel for the executors and these appointees that such amounts are not subject to the tax, because the act contemplates only the interests accruing at the date of death of the decedent, and as these amounts were not determinable until the power of appointment had been exercised, and as it was impossible to ascertain whether any or all of said residuary estate was or would be subject to the tax, therefore, that as the estates were such as were not contemplated by the act, being mere possibilities, and not even expectant or contingent, they were exempt, and contend that RUGER, C. J., in the Matter of Cager (111 *N. Y.* 350), in delivering the opinion of the court, considered just such a case. He says: "Whether an appraisal of the value of these devises, for the purpose of taxation, may be made when they eventually come to the possession of the devisees we are not called upon now to determine. It may be that

the tax will be altogether lost to the state if an appraisal is not now allowed; but if so the fault lies in the act itself, and not in the construction which its language requires to be put upon it."

This language of the learned judge is obiter, but entitled to great consideration; it is not, however, binding upon the courts below, nor is that case at all apropos.

It is true that at the date of the death of Mrs. Stewart, the appraiser could not determine either the value of the estate which might eventually become taxable, or the persons to whom it would pass, and he could not, therefore, make any appraisal. It has been the practice of this court to suspend all proceedings as to such contingent estates until such contingencies happen, with a view to the appointment of an appraiser at that time to make the appraisement.

In the Matter of Benjamin Wallace, 18 *St. Rep.* 387, which was decided by me, I said: "The appraiser should only report upon the property now subject to the tax, and when the contingency happens and the number and interests of the collateral heirs are definitely and exactly determined, another appraisement should then be made and the tax assessed upon their interests then to be ascertained."

In the Matter of Clark, 1 *Connoly Surr. Rep.* 431, I used substantially the same language in holding that until the contingency is decided, the matter must remain suspended, and then it can be determined to whom the property will pass and whether or not it is subject to the tax.

The claim that at the death of this decedent there

was no estate that could be held subject to the tax, and that therefore there can be no tax assessed now, cannot be sustained. It is a well settled principle of the law, that where parties take under a power of appointment, they take under the instrument creating the power, so that the parties named by Henry Hilton, under the power given him, must be regarded as the persons selected by Mrs. Stewart. It is true, that their interests did not accrue until the date when the power was exercised, to wit, January 16th, 1890, at which date also the tax upon their interests accrued, thus entitling them to the rebate of interest if paid within six months from that date.

By section 4 of the act of 1887 (which by chapter 479, Laws of 1889, is made applicable) if the tax is paid within eighteen months from the death of decedent, no interest is charged. By section 5 of the same act, it is provided that "the penalty of ten per cent per annum imposed by section four hereof for the non-payment of said tax, shall not be charged where in cases by reason of claims made upon the estate, necessary litigation, or other unavoidable cause of delay, the estate of any decedent, or a part thereof, cannot be settled at the end of eighteen months from the death of the decedent, and in such cases only six per cent per annum shall he charged upon said tax from the expiration of said eighteen months until the cause of such delay is removed."

It is claimed here that the proceeding instituted by Rosalie Butler on October 28, 1887, effected a stay of all proceedings, in virtue of section 2650 of the Code of Civil Procedure, which provides that the executor

must suspend, until a decree is made upon the petition for revocation of probate, all proceedings relating to the estate except for the recovery or preservation of property, the collection and payment of debts, and such other acts as he is expressly allowed to perform by an order of the Surrogate, made upon notice to the petitioner.

Section 406 of the Code provides, when the commencement of an action has been stayed by injunction or other order of the court or judge, or by statutory prohibition, the time of the continuance of the stay is not a part of the time limited for the commencement of the action.

Neither of these two sections affect this case. There is no provision of law suspending the payment of interest during the time of the litigation or unavoidable cause of delay. Section 5 of the act of 1887 only relieves from the penalty, but not from the interest.

I must hold, therefore, that the tax on the one half of the residuary estate passing by the will to Charles J. Clinch and Sarah N. Smith, must bear interest at the rate of six per cent per annum from April 25, 1888, eighteen months after Mrs. Stewart's death, and that if the tax and interest is not paid immediately upon the entry of the order confirming the report of the appraiser, interest at the rate of ten per centum per annum from the date of the entry of the order must be paid.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—April, 1890.

MATTER OF GALL.

In the matter of the application for the probate of the will of JOSEPH GALL, *deceased.*

Decedent's widow had originally been his servant with whom he had illicit intercourse; later on she lived as his mistress in an apartment which he secured for her, and finally she became by the consummation of a non-ceremonial marriage, as was decided by the Supreme Court, his wife. From the testimony it appeared that the will offered for probate was made while she was living with him, as his mistress: *Held*, that his subsequent marriage, and the birth of issue revoked the will.

APPLICATION for the probate of the will of Joseph Gall, deceased.

The facts appear in the opinion of the Surrogate.

GEO. B. MORRIS, *for proponent.*

A. SIMIS, JR., *for contestant.*

THE SURROGATE.—Joseph Gall died on the 22d day of May, 1886. Two months afterward the suit of Gall v. Gall was commenced in the Supreme Court, Kings county; the plaintiff claiming dower in the real estate of Joseph Gall, deceased, as his widow. This action resulted favorably to the plaintiff, and the judgment was affirmed by the General Term and Court of Appeals (Gall v. Gall, 114 *N. Y.* 109), and settled the fact that an unceremonial marriage had been entered into between the parties, without fixing the time

when such marital relation commenced. In this proceeding the delicate duty devolves upon me of attempting to fix this time, which can be done, I think, better negatively than positively.

Joseph Gall left a last will and testament, dated April 3, 1883, with a codicil thereto, dated April 28, 1884. Proceedings for probate were begun in the first instance in the New York County Surrogate's Court, on the theory that deceased was a resident of the city and county of New York, as undoubtedly he was when both will and codicil were executed. The case of Gall v. Gall (*supra*) fixed testator's residence in the city of Brooklyn, county of Kings, at the time of his death, whereupon the Surrogate of New York county, having lost jurisdiction, dismissed the proceeding, and it was commenced *de novo* in this court. The testator left a widow, Amelia, and two children—Betsy A. Gall, born February 29, 1884, and Caroline Gall, born July 8, 1886, about six weeks after the death of the father. The contestants claim that under the R. S., chap. 6, title 1, art. 3 and paragraph 43, (8th ed., vol. 4, p. 2548,) the will and codicil being made before testator married a second time, were revoked by such subsequent marriage and birth of issue.

It is not contended that testator was married when the will was executed on April 3, 1883, but the proponents insist that this non-ceremonial marriage was consummated some time between the making of said will and the codicil on April 28, 1884. To this I cannot assent.

The relation between these parties was, at its incep-

tion, confessedly illicit, and Judge DANFORTH says in Harbeck v. Harbeck, 102 *N. Y.* 714, "That the union between the parties was, at first illegal, is conceded; if a change occurred, it was followed by no formal celebration, nor is there evidence of any present agreement to take each other for husband and wife" —I do not think the evidence warrants me in finding that these parties had on or before April 28, 1884, "passed by contract or by mutual consent from the state of concubinage into that of marriage."

A case strongly relied upon by the proponents is Badger v. Badger, 88 *N. Y.* 546. It differs from this case in that the proof therein failed to establish an illicit origin of the cohabitation as a separate and independent fact. Judge FINCH, in his opinion, says, p. 553–554: "The rule that a connection, confessedly illicit, in its origin, or shown to have been such, will be presumed to retain that character until some change is established, is both logical and just. The force and effect of such a fact is always very great, and we are not disposed in the least degree to weaken or disregard it. Brinkley v. Brinkley, 50 *N. Y.* 198. Very often the changed character of the cohabitation is indicated by facts and circumstances which explain the cause and locate the period of the change, so that in spite of the illicit origin the subsequent intercourse is deemed matrimonial. Fenton v. Reed, 4 *Johns.* 52; Rose v. Clark, 8 *Paige*, 574; Starr v. Peck, 1 *Hill* 270; Jackson v. Claw, 18 *Johns.* 346, but a change may occur, and be satisfactorily established, although the precise time or occasion cannot be clearly ascertained. If the facts show that there was or must have

been a change, that the illicit beginning has become transformed into a cohabitation matrimonial in its character, it is not imperative that we should be able to say precisely when, or exactly why the change occurred." Caujolle v. Ferrie, 23 *N. Y.* 90.

But in order to hold that such a change has taken place, and to approximate the time, it is necessary to show a mutual present consent between the parties to become husband and wife. "The concubinage which existed for so long a period cannot be transformed into matrimony by evidence which falls short of establishing the fact of an actual contract of marriage. Such a contract, it is true, may be proved by circumstances, but they must be such as exclude the inference or presumption that the former relation continued, and satisfactorily prove that it had been changed into that of an actual marriage by mutual consent." Foster v. Hawley, 8 *Hun* 72.

At or before the making of this codicil I do not think "the shadow cast by their daily lives" would be regarded as matrimonial.

The evidence introduced in the dower suit was substantially the same as that before me in this proceeding; and Judge CULLEN, in his charge to the jury in the dower case, has very aptly and tersely stated the different stages of the relationship as it existed between these parties. He said: "It appears that, from time to time, the relation between these parties changed; that at first she was living as his servant in his house and treated as such. In the second period she was living in apartments in a tenement house which he provided for her—both situations very much

below and inferior to the proper dignity of the wife of a man of means and position like the deceased. Then there was a third period, when she was living over here in Brooklyn, in a house bought by him, her mother and sister living with her, and he visiting her more or less, as you may find the fact to be, because there is a discrepancy between witnesses on that point. Then there was the fourth and last period or epoch, when he moved his property over here and came to live with her."

The commencement of the intercourse in Rutherford place in 1883 was illicit. In January, 1884, the testator places her in a tenement house in East Tenth street, where the first child is born, while he takes a suite of rooms in the Westminster hotel, and it is while she is living in Tenth street that the codicil is drawn and executed. His relations with her in the Tenth street house were undoubtedly the same as they were at Rutherford place. He did not live with her or hold her out to be his wife. This marks the end of the second period as set forth in Judge CULLEN'S charge. She moved over to Brooklyn on the 1st of May, 1884.

The defendants in the suit for dower, and the parties interested in having this will admitted to probate, are many of them the same, and they occupy the anomalous position of strenuously contending in the dower suit that no marriage of any kind had ever been entered into between Amelia Steeb and Joseph Gall, and in this proceeding of insisting with equal vigor that a marriage had been entered into on or before April 28, 1884.

The principal evidence relied upon to sustain their contention is the cohabitation of the parties; that testator called Magdalena Steeb "mother" prior to the making of the codicil, and that he bought a house in Brooklyn in the latter part of April, 1884, about the time the codicil was executed, which he said was "for his family," or, perhaps, "for his wife and family." This evidence is somewhat uncertain, as the parties who gave it are Germans and did not speak or understand our language perfectly. The proponents also rely upon the evidence that the wife of the testator's business partner went with the testator to look at the house with him before he purchased it. From this and similar evidence they claim that a presumption of marriage arôse on or before the making of this codicil. The testimony of Charles Lempke, the business partner of the testator, to whom he had confided all his relations with Amelia, and who was well acquainted with both parties, indicates that at this time there had not been any mutual agreement of marriage between them, or that he regarded her as his wife. He told Lempke on April 24 or 25, 1884, that his social standing and the ignorance of the girl would not admit of his contracting a marriage with her at that time. He went to Europe on the first day of May following, and was absent for two months, and when he returned he again took apartments at the Westminster Hotel.

In this codicil he describes her as "a former servant of my late wife"—and bequeaths her one thousand dollars, and gives five thousand dollars to his child, leaving the rest of his estate, which was quite large,

to his nephews and nieces, some residing in New Zealand, some in California, and one lately in the city of New York. This testamentary disposition toward her both in language and amount renders it strongly improbable that he regarded her as his wife at this time.

It appears from the stenographer's minutes (p. 53): "He said the old lady seemed to give him a good deal of trouble." The old lady was Amelia's mother, and she undoubtedly frequently importuned the testator to make some provision for her daughter and the child, and the fact that his partner also urged him to do the same thing, (stenographer's minutes, p. 41,) seems to me to sufficiently account for his buying the house in Brooklyn and installing her family in it, without raising any conclusive presumption that they had then agreed to marry. So, also, his addressing Magdalena Steeb as "mother," and saying "he bought the house for his family," does not seem to me to establish a mutual contract of marriage in the face of the acts and conversations of the testator himself at this time as heretofore mentioned.

I have not allowed any question of sentiment as to the legitimacy of the first child to enter into my decision in this matter, nor have I attempted to state all the reasons which lead me to the conclusion that these parties, on the 28th of April, 1884, had not passed by mutual consent from a state of illicit intercourse into that of marriage. Such, however, is the conclusion which I have reached upon the whole case.

The will must be deemed revoked, by reason of the marriage of the testator, and birth of issue, after its

execution, and the application for probate must therefore be denied.

NOTE. This decision was affirmed by the General Term of the Supreme Court, 10 *N. Y. Supp.* 661; 32 *St. Rep.* 695.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—April, 1890.

MATTER OF RADDE.

In the matter of the estate of WILLIAM RADDE, *deceased.*

The Surrogate has power to determine whether or not a judgment against an estate is invalid by reason of want of jurisdiction by the court in which such judgment was rendered over the representative of the estate against whom it was recovered.

A judgment recovered against an executor or administrator in his representative capacity in the City Court of New York is void for want of jurisdiction even though the court had jurisdiction of the subject matter of the action and the executor or administrator voluntarily appeared and answered.

Where a claim of a creditor has been disputed and rejected, and no other proceeding taken to enforce it within six months after such rejection than the bringing of an action thereon in a court which had not jurisdiction of action brought against the representatives of a decedent, such claim is barred by the short Statute of Limitations.

APPLICATION by the administrator of the estate of William Radde for an order striking out the name of Mary L. Tyler as a party to the proceeding for the settlement of his accounts as administrator and adjudging that she has no standing as a creditor.

The facts appear in the opinion of the Surrogate.

MATTER OF RADDE.

HERMAN F. KOEPE, *for the administrator.*

LORD, DAY & LORD, *for* MARY L. TYLER, *creditor.*

THE SURROGATE.—During the pendency of the proceeding of the accounting of the administrator herein, in 1887, Mary L. Tyler, the respondent, was allowed to intervene and was made a party to the proceeding by an order entered February 15, 1887. Her petition, upon which the order was based, set forth, among other things, that she was a judgment creditor of decedent; that on or about May 4, 1886, she served her proof of claim upon the administrator, and thereupon received a notice disputing the same, whereupon she served upon the administrator's attorney an offer to refer the claim, which was not accepted. In October, 1886, the administrator filed his account, and objections thereto having been made, a reference was ordered. In March, 1887, the administrator was allowed to file an amended account, to which objections were made and reference ordered. In April, 1888, the report of the referee was confirmed, except as to one item, concerning which further testimony was taken, and in July, 1888, the final report of the referee was confirmed, and in November of the same year a decree was entered which provided that the administrator should at once file a supplemental account. Such account was not filed, and on the application of Mary L. Tyler, the alleged judgment creditor, an order was entered March 24, 1889, directing the administrator to file such account on or before April 1st, instant.

Application is now made by the administrator for

an order striking out the name of Mary L. Tyler as a party to the proceeding, and adjudging that she has no standing as a creditor, upon the ground that the judgment she recovered against the administrator was wholly void and without effect, and that by the lapse of six months after the rejection of her claim, without the commencement of an action to enforce its payment, it was, therefore, barred.

If this judgment is invalid, the creditor not having commenced an action within six months after the rejection of her claim, it is barred by the short Statute of Limitations. I am satisfied that the Surrogate has power to determine the validity of this judgment; (see Matter of Dupuy, 29 *St. Rep.* 642; 9 *N. Y. Supp.*, 121,) though if it were confessedly recovered in a court of *competent jurisdiction* it could not be attacked here. McNulty v. Hurd, 72 *N. Y.* 518; Freeman v. Nelson, 4 *Redf.* 174.

But that is the precise question in this case. Had the City Court jurisdiction, and if not, was that defect waived by the administrator, who appeared and answered in the action? The action brought against him was for the rent of premises hired by the decedent in his lifetime, and for damages for alleged waste committed thereon. Subdivision 3 of section 316 of the Code of Civil Procedure, limiting the jurisdiction of the City Court, provides that it has not jurisdiction of an action commenced against an executor or administrator in his representative capacity.

It is also claimed that the City Court, having jurisdiction of the subject matter of the action, consent

gave jurisdiction over the defendant, who voluntarily submitted.

I do not agree with this proposition. In Davidsburgh v. Knickerbocker Life Ins. Co., 90 *N. Y.* 526, an action was commenced in the City Court of Brooklyn against a domestic corporation. By the laws of 1870, jurisdiction is conferred on that court "where any of the defendants shall reside, or are personally served with a summons within the said city." The defendant appeared (the summons having been served upon its secretary, who resided in Brooklyn) and at the close of plaintiff's case moved that the complaint be dismissed on the ground of want of jurisdiction. This motion was granted. The Court of Appeals say: "The defendant did not take the objection" (want of jurisdiction) "by its answer, but at the end of the plaintiff's case. The point of time does not seem material. The court could not acquire jurisdiction by consent, and might, whenever its attention was called to the defect in the proceedings, refuse to exceed the powers conferred by the law of its creation. There are, no doubt, many cases where the court having jurisdiction over the subject matter may proceed against a defendant who voluntarily submits to its decision, but where the state prescribes conditions under which a court may act, those conditions cannot be dispensed with by litigants, for in such a case the particular condition or status of the defendant is made a jurisdictional fact."

In Risley v. Phœnix Bank, 83 *N. Y.* 337, the court say: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause"

. . . . . "and an erroneous ruling or decision, in the course of the proceedings, does not render its judgment void; but a court authorized by statute to entertain jurisdiction in a particular case only, if it undertakes to exercise the power and jurisdiction conferred in a case to which the statute has no application, acquires no jurisdiction, and its judgment is a nullity, and will be so treated when it comes in question, either directly or collaterally." See also cases cited.

In Callahan as executrix v. Mayor, 66 *N. Y.* 656, an action was brought in the Marine Court to recover salary alleged to be due and unpaid plaintiff's testator as Assistant Sergeant at Arms of the Board of Aldermen. Defendant appeared and answered by attorney, and at the close of the evidence moved to dismiss the complaint on the ground, among others, that the Marine Court "had no jurisdiction of the action or of the defendant," which motion was denied, and judgment directed for plaintiff. The Court of Appeals held, that the officers of a municipal corporation cannot, by consent or omission to object, give to a court jurisdiction in an action against the corporation where the law has conferred elsewhere exclusive jurisdiction of actions against it, and that the appearance and answer by attorney of defendant was not a waiver of the question of jurisdiction, and did not confer jurisdiction.

The decisions above cited are in point with, and cover all the questions arising in the case at bar. I hold, therefore, that the judgment recovered was invalid and void, and that the claim of the creditor having been disputed and rejected, and no action

commenced by her to enforce it within six months from its rejection, she is barred by the Statute of Limitations, and is not a party interested in the proceeding herein.

The application is granted.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—April, 1890.

MATTER OF FOLEY.

In the matter of the estate of JANE FOLEY, *deceased.*

A direction in a will that the residue of the estate of testator be placed in hands of a person named, "to be bestowed in a manner which he may wisely direct," creates a trust which is invalid, because of the absence of a defined beneficiary entitled to enforce its execution, and as to such residue the testator has died intestate.

APPLICATION for the probate of the will of Jane Foley, deceased.

The facts appear in the opinion of the Surrogate.

BOOBAEM, HAMILTON & BECKETT, *for the proponent.*

EDWARD J. KNAUER, *Special Guardian.*

THE SURROGATE.—Issue is raised by the special guardian that the residuary clause of testatrix's will is invalid, and that as to the residuum, she died intestate.

The clause of the will in question is as follows: "and that the residue of my estate be placed in the hands of the aforesaid Rev. Charles H. Colton, pastor of St. Stephen's Church in East 29th street, city of New York, to be bestowed in a manner which he may wisely direct."

It is not contended that the above provision creates a valid trust. The proponent claims that no trust has been created and that the legatee takes the residue absolutely.

A leading case, and one cited with approval by the Court of Appeals of this state, Foose v. Whitmore, 82 *N. Y.* 405, states the rule thus, that "the real question always is whether the wish or desire or recommendation that is expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion." Williams v. Williams, 1 *Sim.* [N. S.] 358.

The intention of the testator must govern, and for this the context of the will must be looked to, first, to ascertain his wishes, and then to see whether he intended to impose an obligation on his legatee to carry them into effect, or, having expressed his wishes, he intended to leave it to the legatee to act on them or not in his discretion. Foose v. Whitmore, *supra.*

The language of the clause in question shows an undoubted intention on the part of the testatrix to create a trust, probably for charitable purposes, leaving to the discretion of the trustee to whose benefit

and in what manner the fund should be applied, and not whether it *should* be applied. The accepted meaning and understanding of the verb employed in the clause indicates this; to bestow is to give, confer, impart—not to the trustee, but to some one or some object he may "wisely direct."

Had the testatrix added to the clause the designation of a *cestui que trust*, it could not be seriously contended that a valid trust had not been created.

The learned counsel for proponent relies upon the case of Willetts v. Willetts, 35 *Hun* 401. He failed to discover that this case was reversed by the Court of Appeals and reported in 103 N. Y. 650, on the opinion of ANDREWS, J., at Special Term. The language of the will in that case was as follows: "I do give and bequeath to my son" . . . . . "and my friends" . . . . . "and my nephew" . . . . . "and my son-in-law" . . . . . "the sum of one hundred thousand dollars, relying upon them to dispose of the same for the benefit of such charitable and benevolent and educational purposes as they shall judge will most promote the comfort and improve the condition of the poor; or in case any of my descendants should become poor and needy, then to apply in whole or in part to such descendants." This was held by the General Term to be an absolute gift to these persons.

ANDREWS, J., in his opinion, says: "With regard to the ninth bequest I am unable to concur in the views of the counsel for the executors and legatees named in the provision of the will therein referred to. As was said by the court in reference to a similar provision in a will: It is an attempt to create a trust not

authorized by the laws of this state. Lefevre v. Lefevre, 2 *T. & C.* 341.

"It seems to me that the intention of the testator is clear. He leaves $100,000 to the seven persons named, who are to take and hold the money, not severally, but jointly, and apply it in their discretion to the uses and purposes mentioned. The money or such part of it as shall not be so applied during the lives of all seven is to go to the survivors, and if any shall remain so long unapplied, to the sole survivor.

"It is true that it has been frequently decided that expressions in a will importing recommendation, hope, confidence and desire, do not raise a trust. The numerous cases to this effect are collected in Leading Cases in Equity, vol. 2, pp. 1833, 1866. It will be found, however, upon examination, that all these cases are of a class different from that to which the one under consideration belongs. They are cases in which it was entirely clear that the testator intended that the devisees or legatees named in the will should receive the property to their own use, accompanied by recommendations or suggestions that some of the provisions should afterwards, in the discretion of the devisee or legatee, be made for some other person or persons. In many cases the testator merely intimates how it would be agreeable to him to have the property disposed of upon the death of the devisee or legatee. In many others the property is given absolutely to the devisee or legatee, with a suggestion or hint that something should be given to other relatives or friends of the testator.

"In the present case it is apparent that the testator

did not intend to bequeath the $100,000 to the seven persons named for their own use, but to make them the medium through which the $100,000 should be distributed to others. The words 'survivors or survivor' do not refer to the date of the testator's death; where a devise or bequest is made to several persons absolutely, those words do not often refer to the date of the testator's death, and of course indicate that the property devised or bequeathed is to go to the persons or person who survives the testator.

"The will cannot be so construed in the present case. Aside from the evident intent to make provision for the benefit of the poor, or for his descendants who might, at some remote period, become poor and needy, it is hardly possible that the testator, who was well advanced in years when his will was executed, should have thought it possible that all the seven but one might die before him, or have deemed it necessary to provide for the contingency by bequeathing the money to the 'survivors' if that word had reference to his own decease. The invalidity of provisions of the kind in question is well established. Levy v. Levy, 33 *N. Y.* 97; Bascom v. Albertson, 34 *N. Y.* 584; Lefevre v. Lefevre, 2 *T. & C.* 341; Matter of Abbott, 3 *Redf.* 303.

"And I am of the opinion that the bequest is invalid, and that the $100,000 must go to and form part of the residuary estate." Willetts v. Willetts, 20 *Abb. N. C.* 473.

In Phillips v. Phillips, 112 *N. Y.* 197, it is said that the primary question in every case is the intention of the testator, and whether in the use of precatory

words he meant merely to advise or influence the discretion of the devisee, or himself to control or direct the disposition intended.

The provision of the will construed in the above case was as follows: "If she" (the executrix) "finds it always convenient to pay my sister Caroline Buck the sum of three hundred dollars a year, and also to give my brother, Edwin W., during his life the interest on ten thousand dollars (or seven hundred dollars per year), I wish it to be done." The court held that the testator meant to charge upon the gift to the wife the annuities to his sister and brother, provided only that their payment should not occasion her inconvenience.

How much stronger the language of the will in question is, than the above.

The testatrix directs her estate to be "*placed*" in the hands of the trustee and "*bestowed*" as he may "*wisely direct.*"

The discretion lodged in him relates to the manner and to whom the residuary estate shall be bestowed.

I hold, therefore, that a trust has been created by the provision of the will in question, which, however, is invalid because of the absence of a defined beneficiary entitled to enforce its execution. Holland v. Alcock, 108 *N. Y.* 312; Pritchard v. Thompson, 95 *N. Y.* 76.

My decision in the matter of Von Swearingen, *Surr. Dec.* 1888, p. 421, is not in conflict with the decision herein. There the language of the will "to dispose of as they may deem proper" is clearly precatory and expressive only of the testator's belief, wish and recommendation.

This testatrix, as to the residuary estate, died intestate.

Submit decree admitting the will to probate, and in accordance with the above decision.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM. SURROGATE.—April, 1890.

MATTER OF DEBAUN.

In the matter of the application for the probate of the will of HOUSEMAN DEBAUN, *deceased.*

Decedent was a man mentally competent but of very weak will and entirely under the domination of his second wife, a woman of boisterous and violent temper, and dissipated habits. Except on rare occasions she refused to permit him to leave the house, and when he went out she nearly always accompanied him. In all important matters his free agency seems to have been overcome. She was positive and aggressive, he was meek and cowardly. Soon after her marriage she announced her purpose to compel her husband to leave his estate to her to the exclusion of his children by his first marriage, one of whom was a helpless imbecile living upon the bounty of decedent's first wife. About three years after the marriage decedent went with his second wife to the office of an attorney and their wills were prepared in accordance with the directions given by her. The will of decedent gave with the exception of insignificant legacies to his children, to his second wife his entire estate, a large part of which was in expectancy and would not vest in him until the death of his mother. At the same time, the second wife who had a property very much larger than decedent's, executed her will leaving all her property to him. The husband lived for six years afterwards without revoking his will. *Held:* that if the scheme of reciprocal wills was concocted by the wife, he acquiesced in it intelligently, understandingly and voluntarily, under the selfish be-

lief that it would be greatly to his advantage if he survived his wife, and that the will must therefore be admitted to probate.

Under the law the injustice of a competent testator towards the natural objects of his loving kindness and bounty cannot affect the validity of his will.

APPLICATION for the probate of the will of Houseman DeBaun, deceased.

The facts appear in the opinion of the Surrogate.

DEWITT C. VAN BUSKIRK, *for proponent.*

S. W. FULLERTON, *for contestant.*

JAMES D. FESSENDEN, *special guardian.*

F. W. ANGELL, *for next of kin of a legatee.*

THE SURROGATE.—The paper offered as the will was executed on the 10th day of September, 1880. By it the decedent bequeathed to each of his two sons, the children of his first marriage, the sum of one hundred dollars, and the remainder of his estate, said to be worth about $20,000, is given to his second wife, Josephine, who is named as executrix. Four witnesses attested the execution.

The decedent was married in 1854 to his first wife, and they resided on a farm in Hackensack, New Jersey, in which his mother had a life interest. Their sons, Charles and Edwin, are now thirty-one and twenty-eight years old, respectively, the first named having been an imbecile from birth. In 1868 or 1869 their mother separated from the decedent, and soon after took the children. In 1872 she obtained an absolute divorce in the state of Rhode Island, on the ground of non-support. She took upon herself the

care and support of the children, and thenceforward the decedent did not see them for several years. She again married in 1873. She supported and educated the younger son until he was licensed as a physician and was able to earn his own living. To support herself, she studied medicine, and has been for sixteen years following her profession in this city.

In 1877 the decedent was married to Mrs. Josephine A. Vreeland, he being her fourth husband, and they resided for a time on the Hackensack farm, then in Jersey City, until July, 1886, when they removed to a house owned by the decedent on Nineteenth street, in New York, where he died in July, 1887, at the age of sixty-two. His widow survived him only a few months, dying childless, at the age of fifty-five.

In 1880, about three years after their marriage, while residing in Jersey City, the instrument in contest was executed, and on the same occasion the wife made her will, in which the husband was made her sole legatee. The greater portion of the estate of which the decedent died possessed did not vest in him until the death of his mother, in November, 1885, five years after the date of the instrument in contest. The estate of the wife came to her from her third husband, and is shown to have been worth from $40,000 to $50,000 at her death.

Though allegations were filed against the mental competency of the decedent, and that the paper was not executed in conformity with the statute, no proof was adduced to sustain them. The sole question for my consideration is that of fraud and undue influence alleged to have been exercised in its procurement.

It is seldom that the usual relations of husband and wife to each other are so completely reversed as is shown by the evidence in this case. Many witnesses were examined, nearly all persons of middle age or past, and the greater number those who had known the husband intimately. The burden of their testimony is that the decedent was a man of little will. She was coarse, selfish, mercenary, exacting; was indifferent to her own kindred and possessed of an unyielding will. She had been three times married and once divorced. The decedent was introduced to her as a man of wealth. During a courtship that extended over two years he observed in her such perverse characteristics that near the hour appointed for the wedding he was depressed in spirits and was reluctant to marry, and would not have done so if a friend, to whom he had confided his feelings, had not urged him. From the beginning of their married life her will seems to have controlled in all her relations with the husband. If her wishes mildly expressed were not complied with she commanded; if commands failed she used threats, and he submitted for the sake of peace. Except on rare occasions she refused to permit him to leave the house, and when he went out she was nearly always in his company. In all important matters his free agency seems to have been overcome. Though pet names were publicly used between them, it had become so much a matter of habit as to have no significance, for the testimony shows scarce any declarations of affection on the part of the husband for the wife, and nearly all his statements are strong evidence that none existed. The case is equally bar-

ren of declarations of the wife of love for the husband. The apparent harmony in their relations observed by one witness when visiting them socially, and by others who met them in business transactions, and which to them seemed evidence of a mutual love and affection, was a result that might be expected between two persons, one positive and aggressive and the other meek and cowardly, and there are abundant proofs of discord throughout their married life, and on all occasions she came out ahead.

Proponent's counsel claims that the exhibitions of the wife's violence were only when she was under the influence of liquor. If not before, certainly very soon after the marriage she was accustomed to use intoxicating drinks to excess, and the habit had so increased that for several years before her death she was a victim of alcoholism to such an extent as to be under disability for days at a time, and to disgrace herself in public. From her own statement, she had once been in delirium tremens, and one witness, called for the proponent, states that during the last three years of her life she was not herself, and was incompetent to transact business. The few who thought their relations were happy and affectionate probably saw them when the wife was at her best, and there were many periods, probably, and some quite extended, when her conduct and language were unaffected by drink. They had no servant or other member of their household, and scarce any social intimates. Occasionally a friend visited them, and when the wife was suffering from her excesses a woman was called in to attend her.

Soon after her marriage she announced her purpose to compel her husband to leave his estate to her, without provision for his sons. She was eight years his junior, and in the ordinary course of nature would survive him. About three years after the marriage, they appeared at the office of an attorney, and she gave directions for the preparation of wills for each. She falsely stated that the decedent's sons had not treated him well, and did not state that one was a helpless imbecile and was living on the bounty of his mother, the husband's first wife. It was only because she believed that, otherwise, the sons could break their father's will (though advised to the contrary) that she directed the insignificant bequests for them contained in the instrument to be inserted, and she suggested the amount of each. She requested two of the subscribing witnesses to be present at the lawyer's office. Though informed that the two were sufficient, she asked that the attorney and another gentleman also act. She directed the husband's will to be first executed, and, though evidently desiring to postpone the execution of her own will, she acquiesced in his wish that both be then signed.

The case is bristling with evidences of the wife's boisterous domination and of the husband's meek submission to her will, and as a whole, it shows that affection was not the motive that acted on his mind when he executed the paper propounded. From his marriage he spoke to friends and acquaintances of the wretched life he was leading. He several times stated his intention to leave his wife, and once made preparations to do so, but was dissuaded. Twice he made

threats of suicide. Though his declarations as proven are not evidence of the facts stated, they do show his real feelings towards his wife, and are proper to be considered as proving the weakness of his will.

The facts developed by the proofs, when considered as a whole, are in sharp contrast with nearly every reported case. Our judicial literature is barren of precedents for the one I have now to decide. The cases in which wills have been set aside for undue influence are generally those of persons borne down with the infirmities of age or disease, and often were executed within a few hours of death. In some, by reason of apoplectic strokes, the testator had lost the power of vocal utterance and the ability to write, and had no power to express with certainty his testamentary wishes, even if his mind were capable of intelligent thought in respect to his estate and his kindred; and in some cases the wills were those of persons of weak mind bordering on imbecility. But in nearly all the wife was without means of her own, but possessed of engaging womanly qualities, and by the exercise of feminine arts, and sometimes by the aid of fraud and misrepresentation, secured her ends. But in this case the husband gives by his will to his wife a valuable estate to the exclusion of his children, and the wife without children, executed a will, bearing even date, giving the husband, in the event of her death, a much larger estate. Both wills were properly executed and at a time when the husband, only a few years the senior of his wife, was in middle age, and in robust health and of undoubted testamentary capacity. But his will so manifestly violates the ob-

ligations resulting from ties of blood, that I have taken pains to read and re-read the able briefs of the respective counsel, and have verified their statements by a perusal of the record of proofs, and I have made a more thorough search into the authorities than I have found it necessary to do in any preceding cases, to find, if I could, an application of the principles of law to the state of facts presented which would justify me, in the interest of moral right, in denying probate to the instrument.

The rule in respect to undue influence is clearly stated by Sir J. P. Wilde: "To make a good will, a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services or pity for future destitution or the like—these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wish is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led, but not driven; and his will must be the offspring of his own

volition and not the record of another." Hall v. Hall, 37 *Law J. Prob.* 40.

"What constitutes undue influence can never be precisely defined; it must necessarily depend in each case upon the means of coercion or influence possessed by one party over the other; upon the power, authority or control of the one, the age, sex, the temper and the mental and physical condition and the dependence of the other. Whatever destroys the free agency of the testator constitutes undue influence. Whether that object be effected by physical force or mental coercion, by threats which occasion fear, or by importunity which the testator is too weak to resist, or which extorts compliance in the hope of peace, is immaterial." Moore v. Blauvelt, 2 *McCarter Eq., N. J.* 365.

"There must be a control exercised over the mind of the testator, or an importunity practiced which he could not resist or to which he yielded for the sake of peace." Trumbull v. Gibbons, 2 *Zab., N. J.* 136.

"The influence must be such, as in some degree or in some extent to deprive the party affected thereby of his free agency, and to make the will not the product of his own untrammeled thought. 1 Jarman on Wills, 132.

"No matter how little the influence is, if the free agency is destroyed, it vitiates the act which is the result of it." Rollwagen v. Rollwagen, 63 *N. Y.* 519; Turner v. Cheesman, 2 *McCarter N. J.* 265.

"The undue influence is not often the subject of direct proof. It can be shown by the facts and circumstances surrounding the testator, the nature of the

will, his family relations, the condition of his health and mind, his dependency upon and subjection to the control of the person supposed to have wielded the influence, the opportunity and disposition of the person to wield it, and the acts and declarations of such person." Rollwagen v. Rollwagen, *supra*.

"Perhaps the most probable instance of such a dominion being acquired is that of an artful woman" . . . . . "having taken possession of a man and subdued him to her purpose." Mountain v. Bennett, 1 *Cox* 355.

"If a wife by falsehood raises prejudice in the mind of her husband against those who would be the natural objects of his bounty, and, by contrivance, keeps him from intercourse with his relatives, to the end that these impressions which she knows had thus been formed to their disadvantage may never be removed, such contrivance may render invalid any will executed under false impressions thus kept alive." Boyse v. Rossborough, 1 *H. of L.* 2.

"If the court sees that any arts or stratagems, or any undue means have been used; if it sees the least speck of imposition at the bottom—if there be the least scintilla of fraud—the court will, and it ought to, interpose." Huguenin v. Basely, 14 *Ves. Jr.* 289.

"Where the will is unreasonable in its provisions and inconsistent with the duties of the testator with reference to his property and family, or what civilians denominate an inofficious testament, this of itself will impose upon those claiming under the instrument the necessity of giving some reasonable explanation of

the unnatural character of the will." 1 Redfield on Wills, 516.

"Apparent unequality or unreasonableness in a testamentary disposition is entitled, in proportion to its degree of flagrancy, to some auxiliary influence, and unexplained, combined with other corroborative evidence, it may be entitled to great influence." Kevil v. Kevil, 2 *Bush.* 614.

"Such an unnatural exclusion from a just and equal share of his estate is a strong circumstance to show either incapacity or undue influence." Reynolds v. Root, 62 *Barb.* 250.

"For such gross inequality, no reason is suggested in the document itself or by the proof on trial. The testator had an unquestionable power to make such a will, but its apparent unreasonableness requires satisfactory evidence that it was the free, deliberate offspring of a rational, self-poised and clearly disposing mind." . . . . "Whilst therefore, the testamentary right should be carefully guarded and faithfully vindicated, the court should be vigilant to prevent, so far as it can, the abuse of that right, by withholding its approving seal from a document so unnatural and so questionable as to freedom and capacity as that now under its final consideration." Harrell v. Harrell, 1 *Duval* 203.

"When the party to be benefited by the will has a controlling agency in procuring its formal execution, it is universally regarded as a very suspicious circumstance, and one requiring the fullest explanation." 1 Redfield on Wills, 515; Marx v. McGlynn, 88 *N. Y.* 358.

"Direct evidence of her control in these matters, of her actual exercise of undue influence in procuring her will to be executed by him, could hardly be expected. The means of keeping the influence out of sight were too many and of too easy application. But when such is the array of circumstances, when such a result is attained without any more substantial apparent cause, we are justified in saying from the evidence that the only cause to be inferred which is in the least degree adequate to produce the result is a long continued, persistent, overpowering influence to which his condition rendered him peculiarly subject, and which she was as peculiarly in a position to exercise." Delafield v. Parish, 25 *N. Y.* 95.

"Undue influence must be the influence exercised in relation to the will. It is not an influence in relation to other matters or transactions. But this principle must not be carried too far. When a jury sees that, at or near the time when the will sought to be impeached was executed, the alleged testator was in other important transactions under the influence of the persons benefited by the will, that as to them he was not a free agent, but was acting under control, the circumstances may be such as to fairly warrant the conclusion, even in the absence of evidence bearing directly on the execution of the will, that in regard to that also the same undue influence was exercised." Boyse v. Rossborough, *supra.*

"A party who offers an instrument for probate as a will must show satisfactorily that it is the will of the alleged testator, and upon this question he has the burden of proof. If he fails to satisfy the court that

the instrument speaks the language and will of the testator, probate must be refused." . . . . "It is not the duty of the court to strain after probate, nor in any case to grant it when grave doubts remain wholly unremoved and great difficulties oppose themselves to so doing." Delafield v. Parish, *supra*.

I have here cited the authorities most favorable to the contestants; but, as stated in Cudney v. Cudney, 68 *N. Y.* 152, "To invalidate a will on the ground of undue influence there must be affirmative evidence of the facts from which such influence is to be inferred. It is not sufficient to show that a party benefited by a will had the motive and opportunity to exert such influence. There must be evidence that he did exert it and so control the actions of the testator, either by importunities which he could not resist or by deception, fraud or other improper means, that the instrument is not really the will of the testator."

The exercise of undue influence is not a question of the age, the infirmities or the physical weakness of a testator, but of his strength of mind to resist the will of others. In determining the issue in a given case, the motive and opportunities for, and the means used for the exertion of the influence, the ability of the suspected party to assert and maintain his supremacy in his effort to stifle the impulses of natural affection or the desire to care for others in dispensing his bounty, are matters for consideration. In this case the decedent, though of middle age, in good health and of sound mind, was as submissive to the domination of his wife, as though he were enfeebled by age, or were an invalid in the sight of death, and

she, under such circumstances, had used the delicate arts of a refined womanhood to accomplish her sinister ends. The mental weakness of the decedent was that which was the result of a passive nature without the power of self-assertion against her overruling, positive mind. A strong case is made by the contestants, and but for the important fact completely established, which to my mind is decisive in respect to the validity of the will, it would be rejected. It is probable that the scheme of reciprocal wills was the suggestion of the wife under the belief that she, being eight years his junior, would outlive him. The proofs show that it was she who dictated the gift to each of his children of the trifling pittance of $100 out of his estate. But if she was sordid and grasping, he was mean, as evidenced by his allowing his first wife to support his children from the time of their separation until his death. When the will was made he knew that his second wife had abundant means which he would take if her death preceded his, and he also knew that he had but a trifling present estate, and that what he gave was only an estate in expectancy. in value not more than one half of that of his wife. It was five years before the life tenancy of his mother was terminated, and he came into possession of the property left him as remainderman under his father's will. At any time previous to his mother's death, had he died, his wife would have taken only the small estate, if any, which he had. Had she died the day after the wills were made he would have taken an estate which, at her death, is shown to have been worth $50,000. If the scheme of reciprocal wills was

concocted by the wife, I am convinced that he acquiesced in it intelligently, and understandingly, and voluntarily, under the selfish belief that it would be greatly to his advantage, if he outlived her. He was willing to take his chances. With her increasing habits of dissipation he might well believe that he would outlive her, and as his death only preceded hers by four months, if such was his belief, his calculation was not far from right. But he lived in fair health six years after the date of the instrument and never disavowed its provisions. At any time he could have formally revoked it, or could have made another by which his children, to whom he owed a parental duty, would have been provided for. That his thoughts had been turned to the subject is shown by the testimony of Mr. White, the draftsman of the instrument under consideration, to whom he stated that he wished to see him to make a new will. He neglected his opportunity or abandoned his purpose, and, as a consequence, one son is coldly shut off with a pittance, and the other, a helpless imbecile, is cruelly denied the sustenance to which the law of nature entitles him. His father's treatment of him was brutal. But, under the law, the injustice of a competent testator toward the natural objects of his loving kindness and bounty cannot affect the validity of his will, and I am compelled to hold that the contestants have failed to sustain their allegation of undue influence.

A decree of probate may be presented.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—April, 1890.

MATTER OF VANDERBILT.

In the matter of the estate of WILLIAM H. VANDERBILT, *deceased.*

Notice of an appraisement under the collateral inheritance tax act should be given to all the parties interested including the District Attorney, the County Treasurer, (in New York city, the Comptroller,) and the legatees affected thereby.

The collateral inheritance tax being a tax upon the passing of property, section 384 of the Code of Civil Procedure requiring actions brought to recover a statutory penalty or forfeiture to be brought within two years after the cause of action accrues, has no application to proceedings to compel the payment of such tax.

An executor is liable for the payment of such tax on property in his hands subject thereto, and he can only discharge himself by producing a receipt sealed and countersigned by the County Treasurer.

The Surrogate has power to compel the payment of the tax, as one of the steps in the final adjustment and settlement of the estate.

Where the appraiser has made a report which erroneously omits from appraisal certain legacies, although the same were subject to the tax, and such report has been confirmed after due notice to the county treasurer, this is such an adjudication as will protect the executor from any liability from the non-payment of the tax on these legacies by him, and in such case the only remedy of the state is a proceeding against the legatees whose legacies were omitted.

An institution which maintains a home and reading rooms, etc., for the poor, provides lodgings and meals free, but makes a small charge for a day nursery which it maintains, is not exempt as an almshouse from the collateral inheritance tax.

An institution which is exempted under a special act from "local taxation or other purposes" is not exempt from state taxation and therefore is subject to the collateral inheritance tax.

Legacies to the Metropolitan Museum of Art and American Museum of Natural History in the city of New York, which derive an income from memberships of various degrees, and dues, from admission fees charged on certain days of the week, from the sale of books, specimens, etc.,

and from investments of property left them by will, etc., are subject to the collateral inheritance tax.

APPLICATION for the assessment of taxes under the collateral inheritance tax act upon certain cash legacies given by the will of William H. Vanderbilt, deceased.

The facts appear in the opinion of the Surrogate.

EVARTS, CHOATE & BEAMAN, *for the Metropolitan Museum of Art and American Museum of Natural History.*

CEPHAS BRAINERD *and* TIMOTHY DAVENPORT, *for the Young Men's Christian Association.*

EDMUND A. BAYLIES, *for the Protestant Episcopal Missionary Society for Seamen.*

MILLER, PECKHAM & DIXON, *for St. Luke's Hospital.*

DAVIES & RAPALLO, *for the Domestic and Foreign Missionary Society of the Protestant Episcopal Church.*

ANDERSON & HOWLAND, *for the executors.*

WILLIAM I. WASHBURN, *for the New York Christian Home for Intemperate men.*

G. R. SCHIEFFELIN, *for the New York Protestant Episcopal City Mission Society.*

STEARNS & CURTIS, *for the Home for Incurables.*

BENJAMIN F. DOS PASSOS, *for the comptroller.*

THE SURROGATE.—This is a proceeding brought by the district attorney to have the tax assessed and fixed upon certain cash legacies given to various charitable institutions by the will of William H. Vanderbilt, deceased.

The said decedent also left legacies to certain individuals upon which the tax was assessed and fixed by an order of the Surrogate entered in June, 1888, con-

firming the report of the appraiser, filed in December, 1887. No notice of the appraisement was ever given to the comptroller or district attorney, or to the institutions now sought to be subjected to the tax. It is clear that each was entitled to such notice.

Judge EARL, in the Matter of McPherson, 104 *N. Y.* 306, says: "When the section provides that he shall designate by order to whom the notice is to be given, it is necessarily implied that he shall designate all the persons entitled to notice. If he should omit to do so, it would be an error on account of which any tax imposed upon the person not notified or heard would be invalid as having been imposed without jurisdiction."

It has been the uniform practice in this court for the district attorney to make the application himself on behalf of the state, and the statute seems to be clear upon that point. By section 17 of the act the comptroller is required, whenever he has reason to believe that any tax is due and unpaid, to notify the district attorney; and the district attorney, so notified, if he has probable cause to believe a tax is due and unpaid, shall prosecute the proceeding, etc. He is a public official, and in these proceedings is directly representing the state. Matter of Arnett, 49 *Hun* 601.

There is nothing to show that the question of liability of these institutions was ever considered, except a statement by the appraiser in his report, that with the exception of two legacies, "and certain other legacies to corporations, which are by law exempted from tax, the only bequests" . . . . . "consist of an-

nuities," etc. This assumption of the exemption of these corporations is declared by the appraiser in his affidavit to be based upon the idea that the former Surrogate considered that all corporations, religious and charitable, were exempt, but there is nothing to show that this question was ever really considered by the Surrogate. The appraiser has no right to declare exemptions. See Matter of Astor, 6 *Dem.* 415. That is the duty of the Surrogate.

It is settled law that this tax is upon the passing of property, upon the privilege of receiving it, and not upon the property itself. See Matter of Howard, 5 *Dem.* 483; Wallace v. Myers, 38 *Fed. Rep.* 184. This being a tax upon the devolution of property, section 383 of the Code of Civil Procedure does not apply.

The liability of executors for the tax seems to be certain. Section 1 of the act provides that they shall be liable for any and all such taxes until the same shall have been paid. Section 6 requires an executor, having in charge or trust any legacy or property for distribution subject to said tax, to deduct the tax therefrom if it be money; and further provides that he shall not be compelled to deliver any specific legacy or property subject to tax until he has collected the tax thereon. Section 8 requires the payment to the comptroller, within thirty days, of any such sum retained for the tax, and further provides that the executor shall not be entitled to credit in his accounts, nor discharged from liability for such tax until he shall produce a receipt sealed and countersigned by the comptroller. It was held in the Matter of McPherson (*supra*), that the imposition and collection of

this tax are simply incidents in the final settlement and adjustment of estates. That being so, the Surrogate has power to compel the payment of the tax, as he has power to compel the payment of the legacy. I have already so held in the Matter of Prout, 19 *N. Y. State Rep.* 318; 3 *N. Y. Supp.* 831.

It appears that on the 10th day of November, 1887, the executors instituted appropriate proceedings before my predecessor, for the ascertainment of the tax, if any, upon all the property passing by this will.

An appraiser was appointed by Surrogate ROLLINS, on the 10th day of November, 1887, "to appraise all the property which shall pass by the will of the said William H. Vanderbilt, deceased, and is subject to taxation pursuant to chapter 483 of the laws of New York of 1885. It is further ordered, that the said appraiser make a report thereof, in writing, to the Surrogate of the value of the property passing under each legacy contained in said will, which is subject to taxation as aforesaid; together with a statement of the name of parties whose interests are subject to the said tax, the amount thereof and of the tax thereon and of the facts upon which such appraisal and report, shall be founded; and that he give at least five days' notice by mail to the said executors and to each person who is a legatee as aforesaid of the time and place he will appraise the property in which the persons so notified shall be interested."

The appraiser filed his report on the 23d day of December, 1887, and the same came regularly before me for confirmation. No objection was made by the comptroller (to whom due notice of the motion to

confirm was given) and the report was confirmed by order entered June 12, 1888, which order is as follows: "On reading and filing the report of Thomas Harland, the appraiser herein, and after hearing Mr. Henry H. Anderson, of counsel for the executors of William H. Vanderbilt, in support of said report, and no one appearing in opposition thereto, it is ordered, first, that said report is, in all respects, confirmed." . . .

The appraiser reported the names of persons to whom property had passed by the will, and also reported that such was all the property taxable under the act. The confirmation of his report was such an adjudication of that question as to protect the executors, and they are not personally liable for the tax. The state must look to the legatees.

I now consider the claims to exemption presented by these institutions separately:

By chapter 253, Laws of 1870, the property of St. Luke's Hospital is declared to be exempt from taxation or assessment. Under the authority of Catlin v. Trustees, etc., 113 *N. Y.* 133, I find that the said St. Luke's Hospital is exempt from this tax.

The Protestant Episcopal Church Missionary Society for Seamen claims exemption under the general act exempting the real and personal property of every poor-house, almshouse . . . . . and every house belonging to a company incorporated . . . . . to improve the moral condition of seamen. I find its claim good, and declare it exempt.

The New York Protestant Episcopal City Mission Society claims exemption as an almshouse. It maintains a home and reading-rooms, etc., and provides

lodgings and meals free. It also maintains a day nursery, for which it makes a small charge. This takes it out of the domain of pure charity—a house wholly appropriated to the poor. I have already decided in several cases that a society to be exempt from this tax as an almshouse must be absolutely free—all benefits given gratuitously. I must, therefore, hold the said society subject to the tax.

The Young Men's Christian Association has, by the Court of Appeals, Young Men's Christian Association v. Mayor, 113 *N. Y.* 187, been declared not to be entitled to exemption under any special act. Only its real property on the corner of Twenty-third street and Fourth avenue is exempt; and as the court expressly held that portion known as the Bowery Institute not entitled to exemption from taxation, the claim of exemption in this case cannot be sustained.

The Domestic and Foreign Missionary Society of the Protestant Episcopal Church was a party in a suit similar to the case of Catlin v. The Trustees of Trinity College (*supra*), and the Court of Appeals declared it subject to this tax. Catlin v. Domestic etc. Missionary Soc., 113 *N. Y.* 625.

The Christian Home for Intemperate Men claims exemption under a special act (Laws of 1881, chap. 546, as amended by Laws of 1888, chap. 523, sec. 7), which exempts from local taxation or other purposes, all the real and personal property of this corporation so long as it or its income is used for the purposes for which it was incorporated. Judge ANDREWS, in Catlin v. Trustees, etc. (*supra*), says: "It has never been the general policy of the state to wholly exempt the

property, either real or personal, of incorporated churches, colleges or charitable institutions from taxation." . . . . "The policy of complete exemption where adopted has been accomplished through special acts applicable to particular and specified corporations." The special act relied upon here simply exempts from local taxation or other purposes, those purposes being evidently local purposes, such as assessments, etc., and could never have been intended to extend to taxation by the state. This institution also makes a charge for patients committed to its home, and that takes it out of the almshouse class. It is liable.

The real estate owned by the Home for Incurables is declared to be exempt from all taxation by section 824 of the Consolidation act, subdivision 5, Laws of 1882. That exemption does not include personal property. Nor can this institution claim exemption as an almshouse, as it charges for the board of patients it receives. It is liable.

The General Theological Seminary; New York Bible and Common Prayer Book Society; The Moravian Church of Staten Island; and the Board of Trustees of the Vanderbilt University of Nashville, Tenn., have submitted no claim to exemption. Under the ruling in the Matter of Catlin v. The Trustees of Trinity College, etc. (*supra*), they are subject to the tax.

The Metropolitan Museum of Art and the American Museum of Natural History each claims exemption under the Revised Statutes (8th ed., p. 1083, subd. 7 of section 4), which exempts "the personal property of every incorporated company not made liable to

taxation on its capital in the fourth title of this chapter." Section 1 of that title reads as follows: "All moneyed or stock corporations deriving an income from their capital or otherwise shall be liable to taxation on their capital in the manner hereinafter provided."

These institutions plead no special act of exemption, but only the general provision. In Catlin v. Trustees, etc. (*supra*), Judge ANDREWS lays down the general rule on the question of exemption: "When, therefore, a corporation not exempted from taxation by its charter or some special enactment, but governed by the general law, claims exemption, it must be able to point to some provision in chapter 13, or to some amendment which takes it out of the general rule declared by section one, above quoted, or else its claim must be disallowed."

If, as was held in that case, the words "incorporated company" were intended to designate only business and stock companies, and if the definition of the Revised Statutes that "moneyed corporations" applies solely to banking or loan institutions and insurance companies, then these two institutions do not come under that head and are not exempt. But should they come within the definition of the term "incorporated company," and are therefore moneyed or stock corporations, they would be equally subject, for section 1 of title 4 of chapter 13 of the Revised Statutes declares that all such corporations, deriving an income or profit from their capital or otherwise, shall be subject to taxation. These institutions derive an income from membership of various degrees and dues; from

admission fees charged on certain days of each week; from the sale of books, specimens, etc., and from the investments of property left them by will, etc. If this is not income or profit derived from capital, it is certainly profit or income derived otherwise, and therefore they are not exempt. These two institutions come clearly within the class subject to the tax under the ruling in the Matter of Catlin, etc. (*supra.*)

Submit order assessing and fixing the tax in accordance with this decision, notice of settlement of order to be given.

GREENE COUNTY.—HON. JOHN SANDERSON, SURROGATE.—June, 1890.

MATTER OF BEDELL.

In the matter of the application for the probate of the will of ANN BEDELL, *deceased.*

The fact that two witnesses to a will disagree as to material facts in regard to its execution is not sufficient of itself to defeat the probate of the instrument. Neither the forgetfulness nor perversity of one of the witnesses should prevent the probate, if it can be ascertained from any source that the formalities required by the statute have been complied with.

One of the witnesses to the will of testatrix was her attorney who had drawn the will under her instructions. He testified fully to facts showing the due execution and publication of the will by testatrix, and his testimony was supported by the attestation clause which in addition to the matters usually contained therein recited that testatrix acknowledged her signature at the time of making it. The other witness who was confused and gave contradictory evidence, testified that she did

not see testatrix sign her will or hear her acknowledge her signature. *Held*, that the proof was sufficient to justify the admission of the will to probate.

Where a will is executed by the testatrix in the same room and in presence of the witnesses, testatrix being in such a position that the witnesses could have seen her write if they so desired, the fact that one of the witnesses did not see the actual motion of testatrix's pen because she refrained from looking at her upon testatrix's statement that doing so would make her nervous, does not render the will invalid for a non-compliance with the statute, (2 R. S., p. 63, § 40, subd. 2,) which requires the execution of a will in the presence of each of the subscribing witnesses.

Testatrix and one of her daughters had lived together for a long time, both being in bad health. Each of them had made wills giving to the survivor a life estate in her property, with the remainder over to the grandsons of testatrix. Another daughter of testatrix was charged by testatrix with undutiful conduct, and was not mentioned in her will. The invalid daughter of testatrix died several months before the mother, but testatrix made no change in her will. Upon several occasions apparently before the execution of her will, testatrix declared that she would have to do as her invalid daughter wanted her to do or else she would not have any peace. There was no evidence to show what led up to these declarations or to what they had reference. *Held*, that there was no proof of undue influence.

APPLICATION for the probate of the will of Ann Bedell, deceased.

J. I. WERNER, *for proponents.*

N. A. CALKINS, *for* LYDIA J. FLANSBURGH, *contestant.*

THE SURROGATE.—The probate of the will of Ann Bedell is resisted on the ground that it was not duly executed according to the provisions of the Revised Statutes, and also for the reason that Mrs Ladoux, daughter of the testatrix, exercised undue influence over her mother in the making of the will. The testimony of the two witnesses to the will is widely apart as to what took place at the time of the execution of

the will. Edwin C. Hallenbeck, a counselor at law, residing at Coxsackie, drew the will and also became a witness to it. Mr. Hallenbeck testifies that he read the will to the decedent, who expressed herself satisfied with it. She also requested him to witness its execution, and then, at the request of Mrs. Bedell or Mrs. Ladoux, he went out and called in Louisa M. Raymond, a neighbor, as the other witness. Nothing further was done until she came. There were present in the room at the time of the execution of the will, the decedent, her daughter Mrs. Ladoux, and the two witnesses. Mrs. Ladoux sat at one end of the table, the witness, Mrs. Raymond, sat at the other end, testatrix sat in front of the table, and Mr. Hallenbeck stood between Mrs. Raymond and Mrs. Bedell. Mrs. Bedell demurred about writing her name, saying she had not done much writing lately. Mr. Hallenbeck told her it would be better for her to write her own name. She then took the pen and he told her where to write. The testatrix said she did not want them to watch her, as she was nervous. She then wrote her name. After writing her name the testatrix said her signature was not very good. There was then some conversation between Mr. Hallenbeck and Mrs. Raymond to the effect that the signature was very good for a person of her age. Witness Hallenbeck then took up the will, and, using the attestation clause as a guide, asked the questions, in regular order, if she acknowledged the same and declared it to be her last will and testament. Witness says Mrs. Bedell looked quizzically at him. Mrs. Ladoux said: "Why don't you answer the question." Then Mrs. Bedell

said: "What did I have the will drawn and you here for?" Hallenbeck told her it was the formal proof. She then said it was. Hallenbeck then asked her if she wished Mrs. Raymond and himself to sign as witnesses thereto, and she answered in the affirmative, or gave her consent. It appears that the testatrix did not audibly respond. The witnesses then signed the will immediately below the attestation clause. Mrs. Bedell then asked Hallenbeck what she should do with the old will, and he told her the new will revoked the old, and she could destroy it or do what she pleased with it. The will itself is a short one, covering, with the attestation clause, less than two pages of legal cap. The signature of Ann Bedell opposite a seal is in large size writing, just above the attestation clause, and on the same page with that of the witnesses. The attestation clause is very full, containing, in addition to the usual words, the following statement: "She, at the time of making such subscription, acknowledged that she made the same." And this is the question Mr. Hallenbeck says he put to Mrs. Bedell, as well as the other one declaring it to be her last will and testament. In form both questions were put in one, and the answer made by her was "Yes," or "It was." While the testatrix was subscribing her name to the will, Mrs. Raymond was talking to Mrs. Ladoux and Mr. Hallenbeck, but Mr. Hallenbeck says he watched her making the motions in writing her name. He does not know whether Mrs. Raymond did the same or not. It is difficult to know how the formal execution of a will can be more perfectly made than this was. Mr. Hallenbeck also made the usual

proof of this will, that testatrix was of sound mind and not under restraint. The other witness to the will, Mrs. Raymond, says she signed her name as a witness to the will, but did not hear the testatrix declare it to be her will; that Mrs. Bedell did not ask her to sign it, but Mrs. Ladoux did. She says she did not see Mrs. Bedell's signature to the will, nor did she see her write her name to it. She heard Mr. Hallenbeck ask if she acknowledged that instrument to be her last will and testament, to which Mrs. Ladoux answered: "That is all." Mrs. Bedell answered nothing. Mrs. Raymond says she supposed it was Mrs. Ladoux's will she was witnessing. She says that after Hallenbeck read something which she does not remember, she signed her name; that Hallenbeck read the instrument over, and she signed what Hallenbeck read aloud. Afterwards this witness says Hallenbeck did not read a word; that she does not remember whether Hallenbeck read from the paper or not, or from the attesting clause, or whether he took up the will and asked the questions from it. It is evident that this witness was confused and forgetful, or very inattentive to what did occur. She does not seem to remember any of the conversation that took place between Hallenbeck and the testatrix. She admits nothing was said about its being Mrs. Ladoux's will. She does not know whether Mrs. Bedell was of sound mind, and thinks she was under restraint, and yet nothing was said or done while she was there that led her to believe that testatrix was under restraint. The will lay on the table when she went in.

The testamentary capacity of the testatrix is satis-

factorily made out. Dr. Merriam, the only medical expert examined, was called by the contestant. He says that she was in the possession of her senses and faculties. Abram M. Hallenbeck, a witness on behalf of proponents, transacted considerable business with her or for her, both before and after the execution of the will. He never saw anything but what she was perfectly rational and capable of understanding her own affairs. Her recognition of friends and of her family relations was full, and never ceased. Several of the witnesses state that she was forgetful, and would repeat a story several times during a conversation. But Mr. Abram Hallenbeck, whose opportunity to observe her mental condition was as good as any one, says he never noticed any loss of memory, or of ability to comprehend what was said. About four years before her death she had suffered from a partial paralysis of the muscles of the tongue. After this she conversed much less, and spoke slower. From nervous prostration, or other causes, she had but partial use of her limbs. She got around with the use of a cane or crutch, or by chairs. The testatrix was about 80 years of age at the time of the execution of the will. It is clearly within the line of the authorities that physical disabilities, and even a considerable degree of mental impairment, are consistent with capacity to make a will, and no stress was placed by counsel for contestants in his brief or argument upon a defence from this source alone. Matter of Soule, 1 *Connoly Sur. Rep.* 18.

The fact that the two witnesses disagree as to material facts in the execution of the will is not sufficient

of itself to defeat the probate of the instrument. Neither the forgetfulness nor perversity of one of the witnesses should prevent the passage of property in the direction indicated by the decedent, if it can be ascertained from any source that the formalities required by the statute have been complied with. A will may be admitted to probate upon the testimony of one of the witnesses to the will in opposition to the testimony of the other, or even in opposition to the testimony of both. Trustees v. Calhoun, 25 *N. Y.* 422; Tarrant v. Ware, *Id.* 425, note; Matter of Stillman, 2 *Connoly Sur. Rep.* 207; Peck v. Cary, 27 *N. Y.* 9; Matter of Cottrell, 95 *N. Y.* 329. The testimony of Edwin C. Hallenbeck, one of the witnesses to the will, is full and satisfactory as to what transpired at the time of the execution of the will. No one can doubt that he is giving the facts as they actually occurred. With his testimony agrees the attestation clause in the will, the will itself, the signature of the testatrix, and all the facts that surround the case.

The only question that can arise upon his testimony is whether the subscription by the testatrix was made in the presence of each of the witnesses. 2 Rev. St., marg. p. 63, § 40, subd. 2. Mr. Hallenbeck testifies that while Mrs. Bedell was signing her name to the will Mrs. Raymond sat a little ways from the table in conversation with Mrs. Ladoux and himself. This was done apparently for the reason that Mrs. Ladoux or her mother had requested the two witnesses not to look at Mrs. Bedell, as it made her nervous. Notwithstanding the conversation that was going on, Mr.

Hallenbeck says that he actually watched Mrs. Bedell make the motions of signing her name, but he cannot say whether Mrs. Raymond watched her or not. It seems by the testimony of Mr. Hallenbeck that he told Mrs. Raymond before he came to the house that Mrs. Bedell wanted her as a witness to her will, and that she came right over. Mrs. Raymond also says she knew she went to Mrs. Bedell's to witness a will. The witnesses and the testatrix were all in the same room, sitting or standing at a table in close proximity to each other. The will was lying spread out on the table. Then ensued the conversation between Mr. Hallenbeck and Mrs. Bedell in relation to her signing the will, and the difficulty she had in writing, and then the request that the witnesses would not watch testatrix. Pen and ink were upon the table. The testatrix then subscribed her name to the will in the manner required by statute. Whether or not Mrs. Raymond actually saw the motions of the pen while Mrs. Bedell was writing her name, it is sufficient if her subscription was made in the presence of each of the witnesses. They were all together for the purpose of witnessing the execution of the will, and where they could actually see testatrix write if they had chosen to do so. The *factum* covers the language of the statute, and is within the language of the authorities. In England, where the statute requires that the witnesses shall subscribe the will in the presence of the testator, these words have often been the subject of judicial examination. The rule there is stated to be: "It is enough if the testator might see. It is not necessary he should actually see them signing,

for at that rate if a man shall turn his back, or look off, it would vitiate the will." Lord ELLENBOROUGH lays down the rule that it is "not necessary that the devisor should actually see. In favor of attestation it is presumed if he might see, he did see." 1 Redf. Wills, marg. pp. 245, 247, 248. In Spaulding v. Gibbons, 5 *Redf.* 316, 319, the Surrogate says: "He does not say that he was not present, but only that he did not see the testator sign. If he was in the same room with him, or in the adjoining room, in such a position that he could see him sign after his attention had been drawn to what was going on, the signing will be considered to have taken place in his presence, particularly as on further examination he says that he does not remember whether or not he saw the testator sign the will." In Gardiner v. Raines, 3 *Dem.* 98, several cases are cited bearing upon this subject, leaving no doubt that the law in this state is the same as it is in England. Peck v. Cary, 27 *N. Y.* 9, 31. The signature of the decedent is plainly visible upon the will; it is on the same page with the signatures of the witnesses, with the attestation clause and a blank line or two intervening between them. The will was spread out upon the table, was signed by the testatrix in the manner above indicated, was declared by her to be her last will and testament, and Hallenbeck and Raymond were requested by the testatrix to sign it as witnesses. Such, at least, is the testimony of one of the witnesses, and some of the facts are conceded by the other witness. We think, also, that these facts are sufficient proof of the due execution of the will. In Matter of Higgins, 94 *N. Y.* 554, 557, the court says:

"Aside from what has been already remarked, we think that the testimony of Jones, who swore positively that the testator acknowledged the will to be his last will and testament, was an acknowledgment of his signature and sufficient with the other evidence given by him to establish a due execution of the will. The signature was plainly visible upon the instrument itself, and the testator having requested Jones and Stoker to subscribe their names to it as witnesses, and he having acknowledged the same to be his last will and testament, the statute was fully complied with in this respect within the decisions of this court." In Matter of Phillips, 98 *N. Y.* 267, 273, the court says: "The exhibition of the will and of the testator's signature attached thereto, and his declaration to the witness to attest the same, were, we think, a sufficient acknowledgment of the signature and publication of the will." Such also is the law of England upon this subject. Baskin v. Baskin, 36 *N. Y.* 416; Willis v. Mott, *Id.* 486; Dayton's Surrogate, (3d ed.,) p. 77, note. The testimony of Hallenbeck goes further than this. He says that after decedent subscribed her name to the will he asked her if she made the same. This is separate and apart from the question whether she declared it to be her last will and testament. Her answer to both questions is in one, "Yes." With this also agrees the attestation clause, which states that "she, at the time of making such subscription, acknowledged that she made the same." Mr. Hallenbeck also states that he framed his questions from the attestation clause, holding the instrument in his hands. In a conflict of evidence the attestation clause becomes

valuable. It cannot be doubted that the evidence of Hallenbeck, skilled and qualified for the performance of his duties, is much more valuable than the testimony of a witness like Mrs. Raymond, who, by her own testimony, was careless and negligent in the performance of what she was called upon to do. The testimony leaves no doubt in my mind that the will was duly executed according to the laws of this state.

The question of undue influence remains to be considered. The charge is that Mrs. Ladoux, daughter of the decedent; exercised this influence over the mother, which overpowered the will of the latter, and caused her to execute a will which does not embody her wishes and judgment. The object of Mrs. Ladoux, it is claimed, was to have her mother make a will that should be more favorable to herself. Both Mrs. Bedell and Mrs. Ladoux were confirmed invalids before the will in question had been made. Mrs. Ladoux was unable to walk, and was wheeled about in a chair. Each of them was possessed of moderate means, the exact amount of which does not appear. Mrs. Bedell had four children; one of them died, leaving three boys, known as the Cook boys, and they are made the residuary legatees in the will. There is also one son, Edwin Bedell, who moved west more than twenty years ago, and, so far as the evidence discloses, he has never returned home since he left. Lydia Jane Flansburgh, the contestant, is another daughter. She moved west about the same time her brother did, and with the exception of a visit made in the fall of 1885, which continued for nearly a year, she did not return home after she left for the west

until about three months before her mother's death. Mrs. Ladoux, the remaining daughter, had lived with her mother a great many years, and they apparently had never lived apart from each other. Both Mrs. Bedell and Mrs. Ladoux had made wills some time before the will in controversy. It seems to have been understood between them that their wills should be so drawn that whichever one died first the survivor should have the use of the decedent's estate as long as she lived. Mrs. Ladoux made the Cook boys residuary legatees in her will. Mrs. Bedell, in her first will, made her daughter Mrs. Flansburgh a legatee, to what extent does not appear. In the second or last will the Cook boys are sole residuary legatees, and the two wills are said to be reciprocal of each other. Mrs. Bedell's first will is not put in evidence, but from the evidence it would appear that the only difference between the first will and the second is in the residuary clause. Mrs. Flansburgh receives nothing, neither does her brother Edwin. The evidence discloses no change in the second will from the first, except in leaving out the name of Mrs. Flansburgh. The provision for Mrs. Ladoux apparently remains the same. Such provision as mother and daughter made for each other in this case seems to be just and proper. If these facts are so, it is difficult to see what interested motive Mrs. Ladoux could have had in urging her mother to make a will which would be really not her own. Some time in the fall of 1885 Mrs. Bedell had a slight stroke of paralysis which affected the organs of speech so as to make it difficult for her to talk, or at least she was much slower of speech than

before. She had also been lame, the result probably of age, which was increased after this new affliction. It was about this time that Mrs. Flansburgh returned home. She remained about ten months before going back, but she occupied a portion of the time in visiting neighbors and friends. It appears that her mother was not satisfied with the conduct of Mrs. Flansburgh while making this visit. She says that Mrs. Flansburgh did not treat her as a daughter should. She complained of her conduct from, at, and before the time of the execution of her will until near her death, in November, 1889. The difficulty seems to have been that Mrs. Flansburgh wanted pay, or more pay, for taking care of her mother and doing housework than her mother was willing to give her. This conduct of her daughter led Mrs. Bedell to send for Mr. Hallenbeck to draw a new will. This was in the spring of 1886. When Mr. Hallenbeck came to the house Mrs. Bedell told him how she wanted her will drawn, of which Mr. Hallenbeck made a memorandum. There was considerable talk between Mr. Hallenbeck, Mrs. Bedell, and Mrs. Ladoux in regard to the legal effect of not mentioning Mrs. Flansburgh in the will, and also in regard to the reciprocal nature of both of their wills. It is undoubtedly true that they canvassed together what disposition should eventually be made of their property, and each understood how the other's will was drawn, or was to be drawn. The only difference there ever was between their views was in regard to the residuary legatees. In Matter of De Baun, before the Surrogate of New York, and reported in 2 *Connoly Sur. Rep.* 304, it was held that although

the will of the deceased was the result of undue influence on the part of the wife, yet as the wills of each of them were reciprocally for the benefit of each other, and in that respect made in the free exercise of their own judgment, the will should be admitted to probate. The case in hand is without direct proof of any undue influence, or of what the law regards as suspicious circumstances. The change made in her will by Mrs. Bedell is sufficiently accounted for by a change in her own feelings towards Mrs. Flansburgh, and this feeling of undutiful conduct continued to a very late period in her life. It is not for the Surrogate to say whether the grounds for this change were reasonable or not. There is no proof whatever that Mrs. Ladoux brought about this change. She agreed with her mother in regard to the matter. There are not the usual *indicia* of fraud or imposition which accompany undue influence. The will was made during the period that Mrs. Flansburgh was on her visit at Coxsackie. She was probably not at her mother's at that time. No effort whatever was made to keep her away from her mother. On the contrary the trouble between her and her mother was occasioned by her unwillingness to stay and take care of her mother and of her house, except on terms that her mother was not willing to submit to. Mrs. Flansburgh occupied very much of her time while at Coxsackie in visiting friends and relatives. Perhaps the strongest item of evidence upon the subject of undue influence is the testimony of witness Abigail Powell, that on repeated occasions "for two or three years back" she had heard Mrs. Bedell say "she would have to do as she [Mrs.

Ladoux] wanted her to do, or else I wont have any peace." It does not appear that Mrs. Bedell had any reference to the execution of the will by her, nor is there anything to show what led up to this remark. It is a sufficient answer to this evidence to say it has no weight in proving the fact of undue influence. There are no facts proved to show that Mrs. Ladoux exercised undue influence. The authorities upon this subject are conclusive that such evidence standing alone is inadmissible and hearsay. Waterman v. Whitney, 11 *N. Y.* 157; Cudney v. Cudney, 68 *N. Y.* 148; Marx v. McGlynn, 88 *N. Y.* 357.

Some importance is attached to the fact that Mrs. Ladoux, a short time before her death, asked a neighbor to answer a letter she had received from Mrs. Flansburgh. Mrs. Ladoux told her to write "that she must not wait for me to write for I am too feeble." Mrs. Bedell said why not send for her at once, to which remark Mrs. Ladoux replied that it was not necessary. I attach no importance to this conversation whatever. It was notice to Mrs. Flansburgh of the feeble condition of her sister, but did not request her to go to the expense of leaving home on that account, unless she chose voluntarily to do so. It could not have been made for the purpose of keeping Mrs. Flansburgh away from Coxsackie, for the reason that about the same time Mrs. Ladoux told another witness that Mrs. Flansburgh ought to have staid and taken care of them while they were sick; if she had done so she would have had a good house, now she would have none. Mrs. Ladoux knew about the will and the circumstances of making it, and therefore she

spoke truly. Mrs. Bedell and Mrs. Ladoux lived together happily and pleasantly all their days. Their business transactions, so far as the evidence discloses, were an open book to each other. Mrs. Bedell survived her daughter about three months, and lived more than three years and a half after the execution of her will. During all this time she remained in possession of her faculties; at least no change in this respect was shown. And yet no change was made in her will, nor did she ever express any desire to make a new will. On the contrary, a short time before her death, and when the pressure of the influence of Mrs. Ladoux, whatever it may have been, had been removed by her decease, she remarked, in answer to a question put by a witness for the contestant, if she had any orders to leave, that she had none, everything was on paper; a re-acknowledgment in fact, if not in law, of the provisions of her will. An examination of the evidence shows that the will of Mrs. Bedell follows very closely the lines of her affections. Of her son Edwin, she said: "I don't think he will come down to see me, but if he thought there were one or two thousand dollars after my death, then he would;" and to Edwin she left nothing. Mrs. Flansburgh was the undutiful daughter, a reiterated opinion, up to near the close of life; and she removed her name from the second will. It is not remarkable that two invalids, mother and daughter, living together in closest intimacy for many years, should seek to provide each for the other a suitable maintenance during the remainder of the life of the survivor. The provisions of their respective wills in this respect are humane and just.

The remark of Mrs. Bedell that there was no peace for her unless she did as Mrs. Ladoux wanted her to do, even if we give it greater weight than I believe it is entitled to, was scarcely a ripple upon the surface of their lives. They were contented in each other's society beyond all controversy. As to the Cook boys, who have now become the principal beneficiaries under both wills, the testimony of all the witnesses agree that they were favorites of their grandmother, and well deserving of her esteem. It is not for this court to say whether some other distribution of the property would not have been more equal and just; it is sufficient to say that there has been no violation of the law in the disposition that has been made of it in the will in question. An examination of a few of the decided cases will show that the conclusions that have been reached are within the lines of well-established precedents. In Brick v. Brick, 66 *N. Y.* 145, the will was made in 1855, leaving a large estate to the widow to the exclusion of brothers and sisters. A witness testified that in 1860 at a dinner, testator and his wife being present, testator said that Samuel was expecting to get something from his estate, and his wife said he would be mistaken; that if she could help it, he would not get anything; that she did not want the money wasted in the extravagant way that Samuel lived. The will had then been made, though his wife did not know it, as she testifies. The court says: "The expression by Mrs. Brick of her opinions and wishes in regard to the disposition to be made by the testator did not amount of itself to undue influence, so long as she did not use unfair or improper

means to have her wishes carried out, and the testator was competent to form his own judgment, and act in accordance with it." A sister of the testator testified, without locating the time, that testator's wife told her that the testator should not leave Samuel anything if she could help it, and that she was not willing that the testator should do anything for her (witness). This witness also testified to many facts for the purpose of showing that Mrs. Brick estranged the affections of the testator from her and her children, and caused her to be expelled from his house in 1855. That a serious difficulty then arose between the testator and his sister is certain. She attributed it to the influence of Mrs. Brick. Her allegations in this respect were controverted. By a will made in 1852 he had bequeathed to her $8,000, but after this quarrel he made the will of 1855, omitting any provision for her. The court says: "He had the right if he chose to exclude his brothers and sister from participation in his estate, and although a disregard of the claims of kindred is a circumstance to be considered in determining cases of this description, yet it is not controlling, nor is it necessary that the motives of the testator for so doing should be satisfactory to the court, provided we are satisfied that it was the real intention of the testator and not the result of moral coercion or deception practiced upon him." See also Clapp v. Fullerton, 34 *N. Y.* 191, where a daughter on slight grounds was excluded from the benefactions of her father's will. In Horn v. Pullman, 72 *N. Y.* 269, the will was in favor of a grandson and his wife to the almost entire exclusion of his own children. At the

time of making his will the testator had become greatly enfeebled by reason of sickness both in mind and body. His sight and memory were greatly impaired, and for a year or two before his death he would repeat questions sometimes two or three times in the same conversation. The court says: "A testator has the right to dispose of his estate in any way he may deem best. He is not required to make an equitable will, and he may, if he chooses, exclude his children, or divide his estate among them unequally. The question in all such cases is, was the will the free act of a competent testator? The reasons for a change in this case do not very satisfactorily appear." One witness testified that in a conversation at her house the testator said that he had willed his property to his grandson for the reason "that Sarah Pullman, his son's wife, had hen-pecked him all the time until he was obliged to do what he did." So also statements made by his grandson's wife, one of the principal beneficiaries, strongly tending to show that every exertion had been made on her part to secure the inheritance of the property, were excluded by the Surrogate, and the court held them entirely insufficient to make out a case of undue influence. In the judgment of this court the will of Ann Bedell was executed in conformity to law, and is the free act and deed of a competent testatrix.

NOTE. See Matter of Kane, *ante*, p. 249.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—April, 1890.

MATTER OF WARNER.

In the matter of the estate of SARAH L. WARNER, *deceased.*

Upon the death of a married woman intestate and leaving no descendants, her interest in an insurance policy of which she is the beneficiary is a chose in action which vests in her husband, notwithstanding the fact that it has not been reduced to possession.

PROCEEDINGS to determine claims to certain personal property belonging to the estate of Sarah L. Warner, deceased.

GEORGE H. STARR, *for administratrix.*

WILLIAM F. SCOTT, *for executors of* T. L. WARNER.

H. D. SEDGWICK, *for* H. G. MACKAYE.

W. M. K. OLCOTT, *for* EMILY B. VON HESSE.

THE SURROGATE.—The interest acquired by the beneficiary upon the issuance of the policy was a chose in action. Olmsted v. Keyes, 85 *N. Y.* 593; U. S. Trust Co. v. Mutual Benefit Life Ins. Co., 115 *N. Y.* 152. Upon the death of deceased, intestate, and without descendants, the chose in action vested in her husband, and the circumstance that it was not reduced to possession is immaterial. Whitehead v. N. Y. Life Ins. Co., 102 *N. Y.* 143; Robins v. McClure, 100

N. Y. 328. In the latter case the court refers to the decision in Fleet v. Perrins, L. R. 3 Q. B. 536, on appeal, L. R. 4 Q. B. 500, in which it was held that where a husband has not interfered with the choses in action of the wife during her life, the same passed to her next of kin, and that his representatives upon his death, after the death of the wife, have no right thereto. The court of appeals said (100 *N. Y.*, page 336,) that this ruling was in conflict with the current decisions of this state, and should not be followed. In Olmsted v. Keyes, *supra*, one L. procured a policy of insurance payable to the plaintiff O., as trustee for the wife of L., in 1846. The wife died in 1857. In 1861, L. married again one M. In 1864, O., the trustee, upon the request of L., assigned the policy to M., the second wife. L. died in 1878, intestate, leaving M., his widow, and one child by her, and several children by his first wife. The action was commenced to determine the conflicting claims of the children of the first wife and M. The court say (85 *N. Y.*, page 602): "All the choses of the wife not reduced to possession during the joint lives, by the common law, passed to the husband upon her death, all, without any exception, and there is no authority to the contrary; and this is true whether such choses are then payable or are mere reversionary or contingent interests, payable at a future day, or mere possibilities. He may then release them or take payment of them without administration, if he can get payment. Ransom v. Nichols, 22 *N. Y.* 110. If administration is needed to reduce the choses to possession, he is entitled to it, and if there are no debts, the

administration is solely for his benefit. If, after his wife's death, the husband does not release, assign, or reduce to possession her choses in action during his lifetime, then after his death his personal representatives are entitled to administration upon them for the benefit of his estate as part of his assets." The court, applying those principles to the case, held that the wife's interest in the policy was a chose in action, and at her death passed to her husband in his right of survivorship. U. S. Trust Co. v. Mut. Benefit Life Ins. Co., *supra*, is cited by the contestants, in support of their contention; but, as a matter of fact, it is an authority against them. The policy in that case, as construed in the court of appeals, is identical with one of the policies in the case at bar. The defendant issued a policy of insurance on the life of F., for the sole use of his wife, but in case she died before him then the amount should be payable to their children, or to the guardian of the children if under age. The wife died, leaving her husband surviving and three children. One of these children died after the mother, before the father, intestate and without issue, leaving a husband surviving her. This action was brought by the plaintiff, as guardian of the children of a deceased child of the insured, to recover their proportionate share of one third of the proceeds which was paid to the administrator (the husband) of the said deceased child. The court said: "When she [the wife of the insured] died before her husband, the only persons interested in the policy were her children then living, and the whole policy, as a chose in action, belonged to them. They held vested interests therein

as they could in other chose in action, payable at a future time. . . . . In the event that has happened, the policy might be construed, and is payable, precisely as if the children alone had been named therein. Therefore when Mrs. Miles [the deceased daughter of the insured] died, her interest in the policy passed to her administrator, as her personal representative, and as part of her personal estate; and upon the death of Mr. Finn [the insured] one third of the policy was payable . . . . . to the administrator of Mrs. Miles."

ORANGE COUNTY.—HON. ROSWELL C. COLEMAN, SURROGATE.—May, 1890.

MATTER OF MAPES.

In the matter of the estate of GEORGE H. MAPES, *deceased.*

Where by one clause of his will a testator gives to one of his sons the use of a specified sum of money during his life, the principal upon the death of the son to be paid to his children, and in another clause there is bequeathed to a daughter "any legacy herein given which may from any cause lapse," *Held*, that at the death of testator, the daughter took a contingent interest which, she having died before the termination of the life estate, at the death of the life beneficiary vested absolutely in her representatives.

IN the matter of the accounting of the executors of the will of George H. Mapes, deceased.

B. R. CHAMPION, *for executor of* SARAH J. MAPES, *deceased.*

MATTER OF MAPES.

W. J. MILLS, *for executor of* JOHN S. MAPES, *deceased.*

THE questions in this case involve the construction of the second and third paragraphs of the will of George H. Mapes, deceased, which read as follows:

"Second: I give and bequeath to my said son John S. the use or interest of $5,000, for and during the term of his natural life, to be paid to him by my executors hereinafter named, in at least quarterly payments . . . . . and at the death of my son John S., I give and bequeath the said sum of $5,000, to his child or children, him surviving, share and share alike; my said executors, or survivors of them, to keep said principal sum properly invested and to dispose of interest and principal as aforesaid. . . . ."

"Third: All the rest, residue and remainder of my estate of whatever character or description, as well as any legacy herein given which may from any cause lapse, I give, devise and bequeath to my daughter Sarah Jane Mapes."

By the codicil to his will the testator altered the amount of the legacy for the benefit of his son from $5,000 to $4,000.

The testator died on June 23, 1884, his daughter, Sarah J. Mapes, and his son John S. Mapes, surviving him. Sarah J. Mapes died July 24, 1888, leaving a last will and testament in which a legacy of $4,000 was given to the American Bible Society, and another of $4,000, to the Ladies Home Society of Orange County, being the greater part of her estate.

John S. Mapes died without issue on January 8, 1889.

It was contended by collateral relatives of George H.

Mapes that, Sarah J. Mapes having died before her brother, her contingent interest in the legacy lapsed and that the $4,000 fund should be paid to them. The executors of Sarah J. Mapes and the parties interested in her estate disputed this and claimed that the fund belonged to her estate.

THE SURROGATE.—The testamentary purpose of the testator is plain. He had only two persons to provide for—a son and a daughter. First, he made certain provisions for the son, including the gift of the use of the $4,000. Then he gave the rest of the estate to his daughter. Evidently he considered the $4,000 a part of his son's share, for, although he was only given the use of it, the testator provided that it should go at the son's death to the children. But he also evidently intended whatever of his estate was not received by his son, or his son's children, should be received by his daughter. This intention I think appears from the fact that he not only gave her "all the rest, residue and remainder," but "as well, any legacies herein given which may for any cause lapse." The testator certainly did not intend to die intestate as to any part of his estate, and this should have its proper influence in determining the construction of the will.

It has happened that the testator's son, John, has died without leaving children surviving him to take the principal of the $4,000 given them. No mention is made in the will what shall become of the $4,000 in this event unless we can find it in the latter clause, where all the rest, etc., is given the daughter. And I think it is proper to so conclude, for the testator

there says: "As well, any legacy herein given which may for any cause lapse, and this is the only case where a lapse could have happened except only one other, the death of the son before the testator, which it is not probable he contemplated.

This being so, it results that the daughter or her representatives are entitled to the $4,000, unless we find in the will that the testator intended that his daughter should only take if she herself survived her brother. If this was his intention, then this legacy does not pass under her will, but goes to the next of kin of the testator by statute, he having failed by his will to provide what should be done with it on the happening of this event.

I have said that the daughter or her representatives take unless we find in the will that the daughter must survive her brother. That is, the will may say so in so many words, or the will may say so by force of the construction given by the courts to the words used, they not being sufficiently plain of themselves. If, however, the will itself shows a clear intention that the legatee shall take absolutely on the happening of the contingency, whether he survive the contingency or not there is no principle of law which will prevent the taking. In those cases where the courts have held that the legatee must survive the contingency upon which the legacy depended, the decisions rest upon a rule of construction and not upon a statute or principle of law.

It may be said that it is more natural to suppose that the testator would prefer to have his collaterals receive it under the statute, his descendants having

failed to live to receive it, rather than have it go to strangers under his daughter's will. It is, however, evident that he did not concern himself in his will about what should ultimately become of any of the property given by him to her, for no mention is made by him what direction any of it is to take at her death. His gifts to her were clearly intended to be absolute and uncoupled with any condition, except the single one, regarding the $4,000, that her brother die without leaving children him surviving.

I, therefore, conclude that Sarah Jane Mapes, at the death of the testator, took a contingent remainder in the $4,000 legacy which then vested in her as a right according to its character and became absolute at the death of John S. Mapes.

The decree should direct that the executors of George Mapes, deceased, pay over the fund to the executors of Sarah J. Mapes, deceased.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—May, 1890.

MATTER OF BECK.

In the matter of the estate of DOROTHEA BECK, *deceased.*

A treaty between the United States and a foreign power is by virtue of the Constitution of the United States a part of the supreme law of the land and supersedes all local statutes which contravene its provisions.

By the treaty of 1828 between the United States and Prussia it is provided that where upon the death of any person holding real estate within the territories of the one party, such real estate would by the laws of the land descend on the citizen or subject of the other were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same and to withdraw the proceeds without molestation and exempt from all duties of detraction on the part of the government of the respective states. *Held*, that during such reasonable time allowed to a Prussian heir, he has precisely the same rights as he would have were he a resident heir, subject to the obligation of selling and conveying the fee within such reasonable time to some one capable of holding.

In the present case by a sale in foreclosure of a decedent's land within about two years and four months after her death a surplus was realized. *Held*, that this was a reasonable time within the treaty with Prussia which would allow the Prussian heirs of decedent to share in this surplus.

APPLICATION by the heirs of Dorothea Beck, deceased, for the distribution of surplus moneys derived from foreclosure of a mortgage upon real estate of decedent.

E. M. BURGHARD, *for petitioner.*

STRALEY, HASBROUCK & SCHLOEDER, *for certain next of kin.*

WILLIAM WATSON, *special guardian.*

MATTER OF BECK.

THE SURROGATE.—The intestate died in the city of New York in August, 1886. Letters of administration on her estate were granted to the Public Administrator, December, 1888. In February, 1888, proceedings were instituted by the German Savings Bank of the city of New York to foreclose a certain mortgage on property belonging to the estate of decedent. In pursuance of such proceedings the premises were sold, and the amount realized on such sale being more than sufficient to pay the claims due on the property, the surplus was deposited with the Chamberlain of the city of New York. The premises were the property of Martin Beck and Dorothea Beck (his wife), jointly.

Martin Beck died in the city of New York on the 16th day of August, 1886, intestate. Dorothea Beck, the decedent herein, thereby became the owner in fee of the premises sold. Application was made for the distribution of these surplus moneys, and citation issued to the Public Administrator and to creditors generally.

Upon such application decision was made by the Surrogate directing distribution, pursuant to the petition of Adam Scior, the brother of the intestate. It was alleged in his petition that he is the only heir at law of the intestate residing within the United States of America. Before the decree had been entered an application was made to allow certain next of kin and heirs at law to intervene. This application was granted, and an order was made making these next of kin and heirs at law parties to the proceedings, and directing that a supplemental citation issue.

The persons seeking their rights to distribution are the brothers and sisters and the descendants of deceased brothers and sisters of Dorothea Beck, the decedent herein, all of whom are citizens of the Empire of Germany. The fact of relationship of the parties to the intestate is not disputed, the sole contention being that because of the alienage of said parties they are not entitled to participate in the division of the real estate or the surplus moneys arising from the sale thereof.

At common law aliens were incapable of taking by descent. This disability, however, is removed by the act of 1845. That act (Laws 1845, ch. 115, sec. 4, as amended by Laws 1874, ch. 261, Laws 1875, ch. 38), recognizes the right of alien kin of a person deceased who was at the time of his death a resident alien or a citizen of the United States, to take *as his heirs*, the lands which would have descended to them in that capacity had they been citizens of the United States. The title of an alien male of full age is, however, made defeasible by the state upon his failure to file an affirmation or deposition respecting his intended citizenship in the manner provided by sec. 1 of the act. Kilfoy v. Powers, 3 *Dem.* 198, and cases cited.

In Goodrich v. Russell, 42 *N. Y.* 177, an alien resident of this state purchased and received a conveyance in 1863 of certain real estate in the city of Brooklyn. The following year he mortgaged a portion of the property so purchased. Some months after the execution of this mortgage he died intestate. He left two sons and one daughter, all of full age, residing in England and British subjects, and no widow.

In deciding that the alien children inherited, the court says, GROVER, J., writing the opinion: "My conclusion is that upon the death of Marsden, the daughter took one third of the real estate by descent, and that the two sons took each one third in like manner, the title of the latter being defeasible by the state unless before the consummation of the proceedings instituted for that purpose the sons filed the deposition," etc., as specified (R. S. *supra*).

It thus seems that alien male heirs have until the consummation of the proceedings instituted by the state to defeat their title, to file the deposition or affirmation as provided by the Revised Statutes.

In the case at bar were it not for certain provisions of the treaty existing between the United States and Prussia the case above cited would control. The applicants for participation in the surplus moneys are residents of the Province of Hesse Cassel, and up to the time of the annexation of Hesse Cassel by Prussia in 1866, were subjects of the Dukedom of Hesse Cassel, and by such annexation became and have since remained Prussian subjects. Art. 2 of the treaty between the United States and Hesse Cassel made March 28, 1844, provides: "When on the death of any person holding real property within the territories of the one party such real property would by the laws of the land descend on the subject or citizen of the other, were he not disqualified by alienage, such subject or citizen shall be allowed a term of two years to sell the same, *which term may be reasonably prolonged*, according to circumstances, and to withdraw the proceeds thereof without molestation, and exempt

from the duties of detraction on the part of the government of the respective states."

Hesse Cassel having become a part of Prussia in 1866, its citizens thereby became Prussian subjects. The above treaty became merged in the one existing at the time between Prussia and the United States, which was concluded in 1828 and which is still in force and effect. It provides: "Where on the death of any person holding real estate within the territories of the one party such real estate would by the laws of the land descend on the citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed *a reasonable time* to sell the same and to withdraw the proceeds without molestation and exempt from all duties of detraction on the part of the government of the respective states."

In Kull v. Kull, 37 *Hun* 476, the General Term of this department construed the treaty existing between the United States and Wurtemburg, which is similar to that of the United States with Hesse Cassel, and held that it became, by virtue of the constitution, a part of the supreme law of the land and supersedes all local statutes that contravene its provisions. The court also held that the treaty intended to confer on the alien heir, for the period of two years, precisely the same rights as he would enjoy if he were a resident heir, in imposing upon him simply an obligation to sell and convey the fee to some other party capable of holding within that period, or such other period as the state or country should see fit to confer upon him by prolonging the time to become or declare his intention of becoming a citizen of this country.

It will be seen that the only question in this case is whether a reasonable time has elapsed since the real estate of the decedent herein became descendible to her alien heirs—a time within which they should have sold the same and withdrawn the proceeds as provided by the treaty. The female heirs being without the prohibition of the statute, are entitled to their shares in the surplus moneys herein. Kilfoy v. Powers, *supra;* Goodrich v. Russell, *supra.*

I am not furnished with any authority construing the treaty upon the point of what is a reasonable time. The question is not easy to decide, but on the facts as they appear in this proceeding, I am constrained to hold that the alien male heirs are entitled to their shares in these surplus moneys.

RENSSELAER COUNTY.—HON. JAMES LANSING, SURROGATE.—July, 1890.

MATTER OF BLOW.

In the matter of the estate of LUTGARDE BLOW, *deceased.*

Where an executor has no authority under a will to collect rents from real estate, an administratrix with the will annexed who succeeds such executor can have no such right.

Where an administratrix with the will annexed has wrongfully collected, with the consent and acquiescence of all interested, the rents of the real estate of testator which under the will should have been collected by a guardian of testator's minor children, the Surrogate has no power to

compel such administratrix with the will annexed to account for such rents and profits, under section 2472, subdivision 3, of the Code of Civil Procedure giving to Surrogates authority to "direct and control the conduct and settle the accounts of executors and administrators." And such administratrix is not estopped by the fact that she has filed an account wherein she charges herself with such rents and profits wrongfully received by her.

SPECIAL proceeding instituted against Philomene Chevalier, as administratrix with the will annexed of Lutgarde Blow, by Julia F. Buchanan, as next of kin, and devisee of decedent, consolidated under Code of Civil Procedure, § 2728, with a proceeding instituted by said administratrix for the judicial settlement of the accounts of said administratrix.

MYERS & NORTON, *for* JULIA F. BUCHANAN, *next of kin and devisee.*

MCCLELLAN & MCCLELLAN, for PHILOMENE CHEVALIER, *administratrix with the will annexed.*

THE SURROGATE.—Lutgarde Blow died, leaving a last will and testament, which was duly admitted to probate by the Surrogate of Rensselaer county, about the 1st day of June, 1877. Her will is as follows: "First. After the payment of all my just debts and funeral expenses, I do give and bequeath unto all my children the property of which I may die seized, to be divided equally between them when the youngest of my children shall reach the age of twenty-one years, except there shall be deducted from the shares of Philomene and Vitaline Chevalier each the sum of $1,000 on account of their father providing by bequest for them in his will. Second. It is my desire that my executor shall be general guardian for my children, and that the rents and profits received from my pro-

perty be expended for the benefit of my youngest children, until they are able to provide for or take care of themselves. I nominate my brother, Louis P. Rousseau, executor of this my last will and testament." The said Rousseau duly qualified, and entered upon the duties of his trust as executor, and so continued until about the 27th day of December, 1877, when, by an order of the Surrogate's court, letters testamentary theretofore issued to him were revoked, and letters of administration with the will annexed were, on the 27th day of December, 1877, issued to Philomene Chevalier, who also qualified as such. Said Lutgarde Blow left her surviving five minor children; and one of said children is still under the age of 21 years. No inventory was filed by the executor or the administratrix with the will annexed, or by the testamentary guardian. Shortly after entering upon her duties as such administratrix, the said Philomene Chevalier obtained leave from the Surrogate's court to mortgage certain real estate for the payment of debts; but no report has ever been made, and no account has ever been rendered, by her of the proceeds of said mortgage. About July 23, 1889, Julia F. Buchanan, one of the children of the said Lutgarde Blow, deceased, and a legatee under the will, petitioned the Surrogate's court for an order that the said administratrix, etc., file an intermediate account in the Surrogate's court of her proceedings as such administratrix, under subdivision 4 of section 2723 of the Code of Civil Procedure. On the return-day of the citation, said administratrix presented a petition, under sections 2728 and 2729 of the Code of Civil Procedure, for a judi-

cial settlement of her accounts as such administratrix; and a citation was thereupon issued from said court directed to all parties interested, and the proceeding instituted by the petition of said Julia F. Buchanan was adjourned until the return-day of said citation. Upon such return-day the proceedings were consolidated, and the administratrix with the will annexed filed a verified account purporting to be a statement of the amount of rents received by her from June 1, 1883, to October 1, 1889, from the real estate which said Lutgarde Blow had devised to her minor children by her said will. Julia F. Buchanan, through her counsel, objected to the account filed upon the ground that it failed to account for the rents received and disbursements made by said administratrix from the 27th day of June, 1877, the time when letters of administration, etc., were issued to her, to June 1, 1883, the date of the commencement of her account, a period of nearly six years, during which time, as she alleged, a large amount of rents had been collected by her as such administratrix, etc., that she had failed properly to account for, and also for the proceeds of the mortgage authorized to be made by her by the Surrogate's court. Such proceedings were thereupon had that the Surrogate at that time, Hon. WILLIAM LORD, directed, without objection, that said administratrix file an amended account, to include alleged omissions; and the matter was adjourned for that purpose from time to time until the 10th day of February, 1889. The said administratrix then appeared before the present Surrogate, and objected, through her counsel, to making and filing an additional or amended account

of the rents and profits received by her from said real estate, and asked leave to withdraw the account therefore filed by her, charging herself with such rents; and insisted that the Surrogate's court had no jurisdiction to compel her to account for the rents, issues and profits which she had received and collected from the said real estate of the said devisee since her appointment as administratrix with the will annexed, upon the ground that the executor named in the will of said deceased was not authorized to collect rents as such, and, if he were, the power did not pass to the administratrix with the will annexed. In fine that she could only be required to account for the personal estate of said deceased in this court. On the part of the said Julia F. Buchanan and the remaining parties in interest, it is insisted that the said administratrix, having admittedly collected a large amount of rents and profits of the real estate devised to the minor children of said deceased, in her character as administratrix, etc., and having voluntarily filed her accounts charging herself with such rents, she is estopped from denying that she had received the same in her character as administratrix, etc., and should be compelled to account and pay for the same to the parties in interest, at least that portion of the rents which she had charged herself with in her account filed. It is apparent that the will, which gives the title to the real estate to the children of the deceased, and merely postpones the division of the same until the youngest child shall attain the age of twenty-one years, confers no power, either express or implied, upon the executor to collect the rents. The collection of the rents

is provided for in the second clause of the will, which appoints a guardian for the children, and directs that the rents and profits realized from the property be expended for the benefit of the children of the deceased, in the manner therein provided. The testamentary guardian is expressly authorized by statute, by virtue of his office, to collect and receive the profits of real estate during the minority of children. 2 Rev. St., p. 150, §§ 1, 3. It follows that it was the duty of their guardian, appointed by the will, to collect the rents from the estate and apply the same as provided by the will.

It is immaterial that a successor to Louis P. Rousseau, as guardian, was not appointed. A failure to fill the office would not authorize the administratrix with the will annexed to collect the rents or to act as such. The offices of administratrix and guardian are entirely distinct, the incumbents having entirely different duties and liabilities. The executor having no right to collect the rents from the real estate belonging to the said minor children under the will, his successor, the administratrix, with the will annexed, could have no such authority, even if it be assumed, as is claimed by the next of kin and devisee, that the administratrix with the will annexed succeeds to the powers and duties of the executor as to the management of the real property. Rev. St. (8th ed.), 2551; Mott v. Ackerman, 92 *N. Y.* 552.

I do not pass upon the question, which was much discussed in the briefs of counsel, as to what authority devolves upon the administratrix with the will an-

nexed, where the executor is by will authorized to sell the real estate. That question is not here.

The next question, and substantially the sole one in this case, is whether the Surrogate's court has the jurisdiction or authority to compel the administratrix with the will annexed to account and to pay over to the persons entitled thereto money which she has concededly in her character as such collected from the real estate left by the testatrix to her minor children. Upon the argument of the matter I was inclined to hold that the Surrogate's court could compel such accounting, and that the administratrix with the will annexed, having in her character as such collected the rents during a long period of time without question by persons interested, was estopped, especially after she had filed an account in this court charging herself with the same, from denying her authority to receive the same as administratrix, and from questioning the authority of the court to compel her to account and to pay over the same to the parties entitled thereto. Prior to the Revised Statutes, a person might assume the office of executor or administrator by his own intrusion or interference. Such person was styled an executor or administrator "*de son tort*," (Toll. Ex'rs, 37; Dayton Sur., 210,) and was liable to account as such. Campbell v. Tousey, 7 *Cow.* 64; Van Horne v. Fonda, 5 *Johns. Ch.* 388. But it seems that they could be held liable as such only in courts of equity, and not at law. Vermilya v. Beatty, 6 *Barb.* 429. And it has been expressly held that the Surrogate could not call an executor or administrator *de son tort* to account. Wever v. Marvin, 14 *Barb.*

380. The offices of executor and administrator *de son tort*, however, have been expressly abolished by statute. 2 Rev. St., p. 449, § 17. It follows, therefore, that an executor or administrator *de son tort* cannot, as such, be held to account either in the Surrogate's court or elsewhere in this state. I have no doubt, however, that although the office of an executor *de son tort* has been expressly abolished, a person will not be permitted in a court of general equitable jurisdiction to deny the character which she has assumed, and under which she has acted, or her responsibility therefor to parties interested. Authorities are ample in support of that position. Le Fort v. Delafield, 3 *Edw. Ch.* 32; Easterly v. Barber, 65 *N. Y.* 252, 259; 1 Perry, Trusts, §§ 245, 264, 288; Lewin, Trusts, 244; Hill, Trustees, 173. Indeed, in the case first cited it was expressly held that, where an administrator with the will annexed assumed to act as trustee of real property under the will, he may be held to account therefor as such trustee. See Redf. Sur. Pr. (4th ed.), 275.

The Surrogate's court, however, is not a court of general equity jurisdiction. The general powers of a court of equity do not pertain to a Surrogate's court. Stilwell v. Carpenter, 59 *N. Y.* 425. It is expressly provided that the jurisdiction of this court "must be exercised in the cases and in the manner prescribed by statute." Code Civil Proc., § 2472. The jurisdiction of the Surrogate to make the order prayed for, if it exists at all, is under his authority "to control the conduct and settle the accounts of executors and administrators." Section 2472, which is a substantial re-enactment of 2 Rev. St., p. 220, § 1. Subdivision 3

of said section gives the Surrogate power "to direct and control the conduct and settle the accounts of executors and administrators." This is the precise language of subdivision 3 of said section of the Code upon that subject. It has been repeatedly held that this provision of the Revised Statutes gives the Surrogate no power to "direct and control the conduct of executors and administrators" as to property to which they did not have title, or of which they had no right to take possession, as such. Executors and administrators are only entitled to the goods, chattels, and credits of their decedent. 2 Rev. St., p. 82, § 2. Real estate or money impressed with real uses is not included in this class. They take that property only which is assets for the payment of debts, and which, after payment of debts and legacies, is to be distributed among next of kin. 2 Rev. St., p. 82, §§ 6–8. Property that descends to heirs does not and cannot go to executors or administrators. If by any means it comes into the possession of the individual who chances to be the personal representative of the deceased, the remedy of the party entitled as heir is by a proper action at law, the form to be determined from the character and situation of the property. An heir at law has no place given him by statute in the Surrogate's court to compel an accounting by the executor or administrator. That right is confined to creditors, legatees, and next of kin. An adjudication of the rights of heirs would be simply void. Upon the settlement of the account, the Surrogate must follow the Statute of Distribution in directing the disposal of the estate after the payment of debts and legacies,

and cannot be guided by statutes of descent. 2 Rev. St. (4th ed.) 277, 278, 281; Shumway v. Cooper, 16 *Barb.* 556; Marston v. Paulding, 10 *Paige,* 40. The rents in question being the proceeds of real estate, and having accrued since the testatrix's death, belong to the heir. The administratrix with the will annexed, therefore, had no concern or responsibility for their collection, nor can she be made to account for such rents as administratrix, for in that capacity she is only chargeable with the goods, chattels and credits which were the property of the deceased. Shumway v. Cooper, *supra;* Matter of Woodworth, 5 *Dem.* 156.

Nor can the administratrix be held responsible in this court by reason of the doctrine of equitable estoppel. In the case last cited, the administrator had obtained possession of the proceeds of certain real estate of which decedent died seized, after her death, and, assuming the money to be personal property, included the amount in his inventory which he filed in the Surrogate's court. It was held upon the accounting by the Surrogate that the money being proceeds of the sale of real estate the Surrogate's court had no jurisdiction to award its distribution or to control the conduct of the administrator in respect thereto. It was further held in that case, that the administrator was not estopped by reason of the fact that he was charged with the amount received in his inventory, and had paid out a portion thereof in satisfaction of the debts of decedent, since the administrator could not, by any act of his own, change the property which the law had impressed with "real uses" into personal property. The rule is the same whether the property

sought to be distributed by the Surrogate is real or personal, a final accounting and decree by a Surrogate directing the administrator to pay over moneys which he had in some way received, but which did not belong to the estate, would be absolutely void; for its effect would be to determine a controversy, or make a distribution between parties in their individual capacity. Tucker v. Tucker, 43 *N. Y.* 136; Matter of Cooley, 6 *Dem.* 77. Neither would the express consent or agreement of the parties give the court jurisdiction in such a case. Matter of Cooley, *supra.* In the latter case the court held that although the accounting administrator held in his hands a sum of money which he had received as such but was not applicable to the payment of decedent's debts, by reason of its peculiar character, but belonged to the widow and children of decedent, the administrator as such could not distribute the fund, nor could the Surrogate's court direct it to be paid to the widow and children of the decedent, to whom it belonged, but they must be left to a suit for money had and received, a purely common law action of which the Surrogate has no jurisdiction. But we are not left to rely wholly upon reason for our decision in this case; substantially the same question before us was presented to the Surrogate of Kings county in the matter of Calyer v. Calyer, 4 *Redf.* 305, and the decision is in accordance with the views we have expressed. The syllabus of the case is as follows: "The (Surrogate) has no jurisdiction to compel an administrator with the will annexed to pay over to the devisee rents from real estate devised to the latter for life, or to re-

strain the further collection of such rents by the administrator. The power of the Surrogate to control the conduct of executors and administrators (2 Rev. St., 220, § 1, subd. 3) does not extend to property to which as executors or administrators they had no title, or right to take possession of." In that case a petition was presented to the Surrogate for an order requiring the administrator with the will annexed to pay over certain rents of real estate which the petitioner claimed were devised to her for life. It was objected on the part of the administrator that the court had no jurisdiction to make the order, and the Surrogate, although satisfied that the petitioner was a devisee of the real estate, declined to make the order for lack of jurisdiction.

As to the remaining question raised by surcharging the account of the personal estate filed by the administratrix and the absence of any account as to the proceeds of the sale of the real estate mortgaged under the direction of the Surrogate's court for the payment of debts, it is ordered that the hearing proceed upon the issues framed.

In conclusion I ought to add that I have reached the foregoing conclusion much against my inclination, for it seemed to me that the personal estate and the rents of the real estate having been so long treated as one, and so thoroughly blended, and the same parties being both heirs at law and next of kin, and all of them before the court, it would be a saving of time and expense, and substantial justice would be best promoted, by having the whole matter at issue decided at one time and by the same court. But I am

satisfied that I have no power to decide as to the rents and profits of the real estate, and any decree I might make in the premises would be void.

CATTARAUGUS COUNTY.—HON. ALFRED SPRING, SURROGATE.—July, 1890.

MATTER OF MORRIS.

In the matter of the estate of TERRY MORRIS, *deceased.*

L. 1874, ch. 446, provides for the confinement of the insane in the Buffalo State Asylum, and makes an insane person, or if the property of the insane person is insufficient, his parent, liable for his maintenance therein. In the present case, the administratrix, who was the widow of decedent, advanced the money necessary to pay for the proceedings preliminary to the confinement of the insane adult daughter of herself and decedent in the said asylum, and also half the expense of her maintenance while therein. *Held*, that upon her accounting the administratrix would be allowed these advances, to be deducted from the distributive share of the insane daughter.

JUDICIAL settlement of the account of the administratrix of the estate of Terry Morris, deceased.

J. H. WARING, *for administratrix.*

J. L. WOODWORTH, *for* B. ALTA MORRIS, *contestant.*

THE SURROGATE.—The administratrix in this case is the mother of the contestant, who is a maiden lady about twenty-three years of age. The administratrix

has embodied in her account a statement of sums alleged to have been paid by her in procuring a certificate from physicians attesting to the insanity of said contestant, and for attorney's fees in the preparation of the papers preliminary to obtaining the order from the county judge directing her to be confined in the Buffalo Insane Asylum, and for one half of the expenses of maintaining and boarding her during her confinement therein. The contestant objects to these items, and raises the question that the Surrogate has no jurisdiction to pass upon them, and this is the only matter left to me to dispose of preliminarily.

Chapter 446 of the Laws of 1874 provides for the confinement of the insane in the Buffalo State Asylum (title 6 of said act) and makes an insane person liable for his maintenance therein. (Title 3, § 30.) Agricultural Ins. Co. v. Barnard, 96 *N. Y.* 525. And had the property of the lunatic been insufficient to maintain her, the mother would have been liable therefor. (Title 1, art. 1, §§ 12, 13.) So that the charge itself —first, was a proper one, to be imposed upon the property of the lunatic; and, second, the mother was simply fulfilling the parental duties devolving upon her in providing for this maintenance. If a committee had been appointed to manage the property of this unfortunate person, it is self-evident the primary purpose to which her property would have been devoted would have been to care for and sustain her. Instead, however, of going through the circumlocution of having a committee appointed, the mother, being the custodian of her daughter's property because she held in her possession the child's portion of her father's per-

sonal estate, paid these charges as they arose, obviously expecting to bring them in as a payment to the daughter on her distributive share on the judicial settlement of the account of the administratrix. Equitably, this made the daughter a debtor of the mother to the extent of these advances. 3 Pom. Eq. Jur., 321, § 1300. So far as abstract justice is concerned, it matters little to the daughter whether this was paid by a committee or by the mother acting as trustee of the daughter in the capacity of administratrix of the father's estate. That the Surrogate, within the equitable powers of his court, has jurisdiction to allow credit for money expended by a parent who is administrator in maintaining his children, seems to be well settled by authority. In Hyland v. Baxter, 98 *N. Y.* 610, the court of appeals, (at page 616,) says: "There seems to be no good reason arising out of the nature of the question, or the constitution of the tribunal, which should deprive a Surrogate, upon the settlement of the account of the administrator, where advances have been made for maintenance, to determine upon equitable principles a claim for an allowance. On the contrary, it would seem to be a very proper place and time to have the question determined, thereby saving expense, and preventing further litigation. It is true that an administrator, in making advances, acts without authority and at his peril, but this is true in every case where a parent, or one *in loco parentis*, or a trustee, or a guardian, makes advances not previously sanctioned by the court, and comes to the court for relief. The fact that the question is an equitable one, and depends on equitable principles, is not a ground

of objection to the jurisdiction." See, also, Haight v. Brisbin, 100 *N. Y.* 219; Brown v. Bedford, 4 *Dem.* 304. Now, there is no substantial difference between the conduct of a mother in providing out of her husband's estate for the care, support, and education of their children, and in her providing for the maintenance of a child afflicted with mental aberration, even though an adult. The obligations of a parent in each case are the mainspring of her actions. She is trustee of each alike, and charged alike with the duty of supporting them. In each case the fund is within the jurisdiction of the Surrogate's court, and that court alone directs and determines its distribution, and it is within its incidental powers, and within the equitable jurisdiction vested in it that it passes upon advances like these in controversy for the past maintenance of one so peculiarly dependent upon the mother for providing for her proper confinement. See, also, Code Civil Proc., § 2472, subd. 3; Id., § 2473; and Id., § 2481, subd. 11. It seems to me clear, therefore, that the Surrogate's court has ample authority to consider and pass upon these sums paid for the maintenance of the contestant while in the asylum, and the expenses incidental and preliminary to her confinement therein.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—July, 1890.

MATTER OF BIRD.

In the matter of the estate of MARY E. BIRD, *deceased.*

A legacy of the value of five hundred dollars is of the fair market value of its face and is therefore subject to the collateral inheritance tax.
A legacy to a child of an adopted child is not exempt from the collateral inheritance tax.

APPRAISAL under the Collateral Inheritance Tax Act (L. 1887, ch. 713).

WILLIAM H. PAGE, JR., *for petitioner and executor.*

THE SURROGATE.—The main question to be disposed of in this matter is whether a legacy of $500 is of the fair market value of its face, and hence subject to the tax imposed by the act, (chapter 713, Laws 1887.) By section 1 of this act it is provided that "an estate which may be valued at a less sum than $500 shall not be subject to such duty or tax." The question seems plainly answered in the affirmative by the act itself, the only source of information on the subject. The intent of the legislature is to be ascertained, and such seems to me to have been that all property of the value of not less than the sum of $500 at the date of decedent's death, passing by will or by our intestate law to collaterals, is subject to a tax of 5 per cent

thereon, which is declared by the act to be a lien upon the property to be taxed, and is a condition lawfully imposed by the legislature upon the devolution of the title to such property. The title to the property vested in the legatee or distributee at the date of decedent's death. At that time it passes to him, and, by the words of the act, its fair and clear market value must be ascertained as of that date, by an appraisement to be then had; and the tax is declared to be then "due and payable," and at that time the right of the state to the tax vested. By section 4 of the act it is provided that the legatee or distributee may have 18 months within which to pay the tax, without interest. It would seem, therefore, that the legislative intent is clear. For six months after the legacy may have come to his possession, the legatee is relieved from the payment of the tax. It seems to me plain that the legislature, in order to effectuate the purpose of this act, were compelled to provide a time when the value of the property subject to the tax must be ascertained, and upon that value the tax must be paid as a condition of its delivery to the legatee. The machinery provided for ascertaining the value of such property was not intended for use in respect of moneyed legacies. Section 6 of the act proves the soundness of this proposition, I think: "If the legacy be moneyed, the executor shall deduct the tax therefrom, or if the legacy or property be not money, he shall collect the tax thereon upon the appraised value thereof from the legatee or person entitled to such property; and he shall not deliver or be compelled to deliver any specific legacy or property subject to tax to any

person until he shall have collected the tax thereon." This section further provides that "if such legacy be given in money to any person for a limited period, he [the executor] shall retain the tax upon the whole amount." Thus we see that the legislature plainly distinguished between a moneyed legacy and one of other property, and find authority for the construction which has been given to this act by me in several cases heretofore, that a money legacy need not be appraised. In fact, the meaning of the act itself is an appraisement by the legislature of a money legacy at its face value at the date of the decedent's death. Legacies of property not in money are to be appraised at their fair, clear market value, as of the date of decedent's death, not as of one year thereafter, when the legacy is payable and its delivery may be enforced. It is said that the fair, clear, market value of the property subject to the tax is what it will be worth when the legatee is entitled to receive it, and may compel its delivery to him. This construction of the act works its repeal. Moreover, it is contrary to its very letter. The soundness of this proposition is shown by a consideration of the rights of the parties in case of property other than money, which had appreciated in value since decedent's death; for instance, stocks. I am aware that the learned Surrogates of Westchester and Kings counties have decided this question differently. They have appraised the money legacy at what it will be worth to the legatee at the end of the year, and to ascertain that fact they take 5 per cent from its face value. I confess I am unable to perceive any authority for that rate of discount. Legal

interest is 6 per cent, and, if any discount should be allowed, why not at the legal rate of interest? At this point it occurs to me that the rate of interest might be increased or diminished within a year after decedent's death, and, of course, any change in the rate of interest would, according to the construction of the learned Surrogates, affect the market value of the legacy. I am unable to accept their construction of this act, and I must hold that the legacies of $500 each are subject to the tax.

Another question is presented by counsel for executor, who has most ably and ingeniously argued against the liability of these legacies to the tax, to wit: That one of the legatees should be held exempt upon the ground that she is a child of an adopted child, and, as such, falls within the exempted class. I cannot acquiesce in this construction. The statute (section 1) is very explicit in stating the classes that are exempted, and expressly declares that a person adopted, or who has stood for more than 10 years in the mutual acknowledged relationship of a parent, is exempted, not the descendant of such person. Appraiser's report is affirmed.

NOTE. *Contra*, Matter of Peck, *ante*, p. 201.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE—September, 1890.

MATTER OF LASAK.

In the matter of the estate of FRANCIS W. LASAK, *deceased.*

A legacy, not payable out of the residue of the estate, given to an adult child of testator for support, draws interest from the date of the death of testator at the rate which the fund, if invested as directed by the will, would produce.

APPLICATION to compel payment by the New York Life Insurance and Trust Company, administrator, with the will annexed, of the interest on a legacy.

The testator by his will and codicil gave to his executor in trust, the sum of $30,000, to manage, invest, etc., only in United States or state stocks, or in city bonds, or in bonds and mortgages of real estate in New York or Brooklyn or Westchester county, and to pay over the interest and income thereof to his daughter Antoinette Lucinda Lasak, now Schermerhorn, in quarterly payments during her natural life, with remainder to her issue. Other trusts were created by the will. There was a contest over the will, which was finally admitted to probate by decree bearing date in July, 1889. The sole executor named in the will renounced the office and in September of that year the New York Life Insurance and Trust Company was appointed administrator with the will annexed, having already been named in the will

as substituted trustee in case the person designated declined to act. An appeal was taken from the decree admitting the will to probate which has recently been determined by an affirmance of that decree. It is asserted that an appeal is now about to be taken to the Court of Appeals from the judgment of affirmance. The administrator has in hand about $270,000 of assets of which about $40,000 is invested in U. S. 4 per cent bonds and about $220,000 in stocks and railroad bonds. The testator died in February, 1888. After the will was admitted to probate and pending the appeal, an application was made to the Surrogate for an order directing the administrator to pay to Mrs. Schermerhorn interest on the fund from testator's death for the first quarter, which application was denied on the ground, among others, that the beneficiary not being a minor and the bequest not being made for her support, she was not entitled to it. This decision was reversed on appeal and since then the Surrogate has made several *ex parte* orders directing said administrator to pay to Mrs. Schermerhorn, by each order, the sum of $450, which was the interest for each quarter at six per cent on the $30,000 fund. The last of these orders was made in July, 1890, directing payment for the quarter including August 13, 1890. This the administrator declined to obey, and was cited to show cause why it should not comply with the order. The cause now alleged is that for the six months following the expiration of the year from the testator's death it has paid to the legatee $600, leaving due to her of interest actually earned only $43.30 instead of the $450 ordered to be paid.

MATTER OF LASAK.

AARON KAHN, *for the petitioner.*

EMMET & ROBINSON, *for N. Y. Life Insurance and Trust Company, administrator, with the will annexed.*

THE SURROGATE.—In regard to interest on legacies, these rules seem to have been settled: If a general legacy be given with no time of payment fixed, it begins to draw interest one year from the date of the letters when it becomes due. Thorn v. Garner, 113 *N. Y.* 197. If a legacy is given for life with remainder over, no interest is due until the end of two years. *Per* Lord Eldon in Gibson v. Bott, 7 *Vesey*, 96; Sullivan v. Winthrop, 1 *Sumn.* 13. But where it is given for support, it will draw interest from testator's death, Cooke v. Meaker, 36 *N. Y.* 15; 5 *Allen* 270; and so in respect to the bequest of a residue of personal estate for life with remainder over, the general rule (called the rule in Howe v. Lord Dartmouth, 7 Ves. 138 a) is that where a residue of personal property is bequeathed for life, with remainder over, and not specifically, it is to be converted into the three per cents—(having no such three per cents, the only rule recognized in Massachusetts as obligatory upon a trustee in making investments is that he shall act with good faith in the exercise of sound discretion. Harvard v. Amory, 9 *Pick.* 446.) The tenant for life of a bequest of the residuum is to be allowed as from the death of the testator the income of such parts of the personal estate as were at his death, and have remained, in a state of investment which ought to be recognized and allowed to be continued by a court of equity. But that with regard to those parts which were not at his death, nor have been since in such a

state of investment as can be so recognized, they must be so valued as at a period of one year after his death, and interest from his death on the value so taken, not exceeding four per cent, must be paid to the tenant for life. 2 Williams on Executors, 6 Amer. ed., 1498–9. If there is a positive direction in a will that the trustee shall convert the personal estate into government or real securities, and hold them in trust for one for life and remainder over, the *cestui que trust* for life is entitled to receive only so much income as would have arisen from the personal estate, if converted and invested within a year after the testator's death. Trustees are ordinarily allowed one year to convert the estate into the securities directed by the will. Perry on Trusts, (2d ed.,) § 548, and cases cited. And if there be an unconverted security bearing a much higher rate of interest they cannot pay the whole interest so arising to the tenant for life; if they do they will be liable to make good to the remainder, and the difference between what should have been paid under the above rule and the sum actually paid. Id., citing Dimes v. Scott, 4 *Russ.* 195; 2 Jarm. on Wills, 202 (5th Am. ed.)

Applying these rules so far as pertinent to the facts as presented, it having been determined in this case by the Supreme Court, apparently in conflict with the dictum in Thorn v. Garner, *supra*, that the legacy although not given out of the residue, is given for the support of Mrs. Schermerhorn, who was an adult married woman, she is entitled to such interest from the death of the testator as the fund if invested as he directed would have produced. No question, however,

as to past payments is here involved, the only one to be considered being the amount which should be paid to her for the quarter ending August 13th last. Of the whole amount in the hands of the administrator, $50,298 he left in cash has been invested in the U. S. four per cent consols of the face value of $40,400, which therefore costs 124 per cent, yielding an annual interest of $1,616 or about $3\frac{23}{31}$ per cent on the amount so invested. The balance of the fund on hand still remains in the securities in which it was invested by the testator which are of a character not recognized by the courts, amounting at par to $219,000, (estimated present value $223,124.) This sum at four per cent would produce an income of $8,760, but it actually yielded $10,410, but a portion of it ($140,000) was subject to taxation, and the administrator paid on account thereof the sum of $2,800; thus making the net income $7,610 or $1,150 less than the four per cent rate would have made. Let us now see what interest would have been earned for the beneficiary if the securities had been converted into bonds and mortgages. The affidavits are somewhat conflicting as to current rates of interest on investments of that description. It seems doubtful if they would exceed five per cent, but giving to the beneficiary the benefit of the doubt and fixing the average rate at about five and one half, the principal would be subject to a tax of about two per cent and thus it would net only three and a half per cent, or $7,665, on the $219,000. Thus if the fund for the benefit of this legatee had been invested in either of the modes mentioned and as directed by the testator, the net interest to which she

would be entitled, to wit $3\frac{2}{100}$ on the cost of the government bonds and $3\frac{1}{2}$ on mortgages, could not exceed three and one half per cent, about the rate actually earned on the whole. As to the producing character of the alternative investments of city bonds and state stocks, no evidence is furnished, but it is fair to assume that they would have yielded no greater rate of interest.

It does not seem to be necessary here to go into the question determined by Farwell v. Tweddle, 10 *Abb. N. C.* 94, where it was held that a trustee investing in government bonds at a premium, should retain a certain portion of the interest to make up the difference between the cost and the amount received at maturity. Here no portion of the fund or securities held has been set apart for any of the beneficiaries, and no conversion of the securities held by the testator in his lifetime has been made, doubtless because of the contest pending in relation to the validity of the will. Had they been converted and invested and the fund for the benefit of Mrs. Schermerhorn been set apart in government bonds, the question above disposed of might have been properly raised; but as it stands she has no more interest in that investment than any other beneficiary. And still it is, to a certain extent, a proper subject for consideration.

The conclusion is that the administrator was justified in declining to comply with the order directing the payment of $450, and that such order should have directed the payment of $262.50, only for the quarter covered by that order, which is in effect, allowing her

interest on the fund at the rate of three and one half per cent.

The order should be modified accordingly.

ORANGE COUNTY.—HON. ROSWELL C. COLEMAN, SURROGATE.—September, 1890.

MATTER OF BROWN.

In the matter of the application of LEANDER L. PURDY *and others for letters of administration with the will annexed of the goods, chattels and credits of* HARRIET BROWN, *deceased.*

Upon the death of a residuary legatee after the death of testator but before the will is admitted to probate, the right to take out letters of administration with the will annexed on the estate of testator passes, not to the representatives of the residuary legatee, but to the next class named in the statute, (Code Civ. Proc., § 2643,) to wit; to principal and specific legatees.

APPLICATION by Leander L. Purdy, Charles G. Dill, Gilbert Brown and Effie A. Miller, for letters of administration with the will annexed on the estate of Harriet Brown, deceased.

JOHN L. WIGGINS, *for petitioner,* LEANDER L. PURDY.

WILLIAM D. MILLS, *for petitioner,* GILBERT BROWN.

C. G. DILL, *for petitioner,* EFFIE A. MILLER.

THE SURROGATE.—Harriet Brown died Decem-

ber 10th, 1889, a resident of this county, leaving a will, which has recently been admitted to probate, in and by which her sister, Dolly J. Brown, was made her sole legatee and sole executor. The sister survived the testatrix, but died before the will was admitted to probate. Applications for letters of administration with the will annexed have been filed by Leander L. Purdy, the administrator with the will annexed of the said Dolly J. Brown, deceased; by Charles G. Dill, the executor, etc., of Maria Brown, another deceased sister; by Gilbert Brown, the only brother of the said Harriet Brown, and by Effie A. Miller, a niece. There are other next of kin living, but none so near related to the testatrix as the brother Gilbert. Section 2643 of the Code of Civil Procedure provides who must be apppointed by the Surrogate. First, residuary legatees, next, principal or specific legatees, and next, one or more of the next of kin. It is claimed on behalf of the applicant, Purdy, that, as the representative of the residuary legatee, he is first entitled to the appointment, and on behalf of the brother it is claimed that the residuary legatee being dead, and there being no other legatees, the right to the administration belongs to the third class of persons designated by the section, the next of kin, and that in that class he is first entitled, the others being nephews and nieces or their decedents. The rule in English courts undoubtedly was and still is that, "where the residuary legatee survives the testator and has a beneficial interest, his representative has the same right to administration *cum testamento annexo* as the residuary legatee himself, and is therefore entitled to ad-

ministration in preference to the next of kin, or to legatees." Williams on Executors, 465, original paging. So strong have been the efforts of those courts that the right of administration should follow the right of property, that in some cases where the statute expressly gave the right of administration to the next of kin the courts have held that the spirit of the act excluded the next of kin where there is a residuary legatee. Id. 464. And the courts in this state were at first inclined to give the same construction to the statute designating who are entitled to administration and administration with the will annexed. Public Administrator v. Watts, 1 *Paige*, 382; Public Administrator v. Peters, 1 *Bradf.* 100; Willard on Executors, 195; Dayton Sur. 235. But in the case of Lathrop v. Smith, 35 *Barb.* 64, affirmed in 24 *N. Y.* 417, it was held that the next of kin were entitled under the statute to administration, although not entitled to share in the distribution of the estate. And in Kircheis v. Scheig, 3 *Redf.* 277, the Surrogate of New York county, upon the authority of Lathrop v. Smith, held the same way in the case of administration with the will annexed, and the same rule of construction was again applied in Butler v. Perrott, 1 *Dem.* 9. The counsel for Mr. Purdy claims that the case of Kircheis v. Scheig, *supra*, is not authority in this case, because the moving party in that case was the legatee of the deceased residuary legatee, and not the deceased residuary legatee's executor or administrator, and therefore not within the English rule; and, further, that a different rule applies in cases of administration with will annexed from that of ordinary

administration. The only instance that I recall in this state where one occupying a representative capacity is entitled to administration upon another's estate in the right of the person whom he represents is in the case of a guardian of a minor, and then it is because of a statute giving that right. 4 Rev. St. (8th ed.), p. 2253, § 33. At the time of the decision of Kircheis v. Scheig, in 1878, section 14 of 2 Rev. St., p. 71, was in force, and provided that letters with the will annexed shall be granted in the same manner and under the same regulations as letters of administration in cases of intestacy. This section was repealed by chapter 245 of the Laws of 1880, and provision was made by section 2643 of the Code of Civil Procedure regulating the issuing of such letters, which does not include any provision similar to that just quoted. However, it seems to me that the same reasoning by which Judge DAVIES, in the opinion in Lathrop v. Smith, *supra*, reached the conclusion that administration must be granted in the order mentioned by the statute, although by so doing it may, in some circumstances, give the letters to one who has no distributive interest in the estate, applies with equal force to this section of the Code, which provides that the Surrogate must issue letters to the persons there designated in the order prescribed; and if it shall happen that there were none of the first class, or if there have been such, but who are not, at the time of the application, then the right passes to the next class, and not to the representatives of the deceased of the first class. Letters will therefore be granted Gilbert Brown.

CHAUTAUQUA COUNTY.—HON. DANIEL SHERMAN, SURROGATE.—September, 1890.

MATTER OF GILBERT.

In the matter of the judicial settlement of the account of EDWIN S. GILBERT *and* MILO O. GILBERT, *executors of the will of* ORONSO S. GILBERT, *deceased.*

By his will testator gave to his wife all his property, to have, hold, possess, use and control the same for her own personal benefit during her life, and at her death all that might then remain to seven specified children. The executors were given full power and authority to sell and convey any portion of the real estate, on condition that such sale be approved of and concurred in by testator's wife. The will also provided that the appointment of appraisers at testator's death should not be required, that the whole management of the property should immediately vest in the wife, and be subject to her absolute control during her life and that she should not be subject to any accounting therefor. *Held*, that the wife took only a life interest and use of the property of testator, to hold the same in trust for her necessary support and maintenance; that the provisions declaring the estate not subject to an accounting were nugatory and void, as contrary to law and to the whole text of the will.

JUDICIAL settlement of the account of the executors of the will of Oronso S. Gilbert, deceased.

NORMAN M. ALLEN, *for* HELENA M. GILBERT, GEORGE C. GILBERT *and* LENA W. GILBERT.

T. A. CASE *and* J. E. HAZARD, *for* EDWIN S. GILBERT, MILO O. GILBERT, JAMES A. GILBERT, JOSEPH C. GILBERT *and* JOSEPHINE BENTLEY.

THE SURROGATE.—The testator died April 21, 1888, leaving Helena L. Gilbert, his widow, Edwin S. Gil-

bert, Milo O. Gilbert, James A. Gilbert, and Joseph C. Gilbert, sons, and Josephine Bentley, daughter of his former deceased wife, and George C. Gilbert, son, of full age, and Lena W. Gilbert, daughter, aged 15 years, children by his said widow, Helena, him surviving. He died seised of unencumbered real estate, consisting of several improved farms containing 330 acres, in Chautauqua county, of the value of $8,000, and owning personal property of the value of $5,500, and owing debts not exceeding $2,000. He made his will, dated March 31, 1888, probated May 28, same year, and appointed his two eldest sons by his first wife, said Edwin and Milo, executors thereof, of which will the following is a copy, not including the formal parts: "First. After all my lawful debts are paid and discharged, I give, devise, and bequeath to my wife, Helena L. Gilbert, all my property, both real and personal, to have, hold, possess, use, and control for her own personal benefit during the term of her natural life. Second. At the event of the decease of my said wife, Helena, I give, devise, and bequeath all that may then remain of my said estate to my following named children, share and share alike, to wit: Edwin S. Gilbert, Milo O. Gilbert, James A. Gilbert, Josephine Bentley, Joseph C. Gilbert, George C. Gilbert, and Lena W. Gilbert. Third. I hereby give and grant to my executors, hereinafter named, full power and authority to sell and convey any portion of the real estate of which I may die seised: provided, however, that such sale shall first be approved and concurred in by my said wife, Helena, and shall be deemed by my said executors for the best interest of my said es-

tate. Fourth. Nothing herein contained shall require the appointment of any appraisers of my said estate at the event of my decease. But my whole property, its management and use, shall immediately vest in my said wife, and be subject to her absolute control during her lifetime, and she shall not be subject to any accounting therefor."

It is claimed by the learned counsel for said Helena L. Gilbert, widow, George C. Gilbert, son, and by the special guardian and counsel for said Lena, minor, being children of the testator by his said second wife, that such will gives to the widow the absolute title to all the said real and personal estate, after payment of debts, funeral expenses, and expenses of administration, and that the use and possession of same was not limited to her life, and cite the following authorities: Campbell v. Beaumont, 91 *N. Y.* 465; Van Horne v. Campbell, 100 *N. Y.* 287; Clarke v. Leupp, 88 *N. Y.* 228; Roseboom v. Roseboom, 81 *N. Y.* 356; Griswold v. Warner, 51 *Hun*, 12; Leggett v. Firth, 53 *Hun*, 152. It is claimed by the counsel for the executors and other children by the first wife of the testator, that the testator intended to and did by his will give to his widow only the use of his property, real and personal, after paying debts, funeral expenses, and expenses of administration, during her natual life, for her necessary support and maintenance, and at her death the remainder of his estate to his seven children, legatees named in his will, share and share alike, and cite the following authorities: Simpson v. French, 6 *Dem.* 108; Matter of Verplanck, 91 *N. Y.* 439; Matter of Westcott, 16 *St. Rep.* 286; Wager v. Wa-

ger, 96 *N. Y.* 164; Taggart v. Murray, 53 *N. Y.* 233; Van Vechten v. Keator, 63 *N. Y.* 52; McKeown v. Officer, 6 *N. Y. Supp.* 201; Matter of Fuller, 16 *Civ. Proc. Rep.* 412; Black v. Williams, 51 *Hun*, 280; Terry v. Wiggins, 47 *N. Y.* 512; Greyston v. Clark, 41 *Hun*, 125; Rose v. Hatch, 55 *Hun*, 457. While these authorities illustrate the general well-established principles governing the construction of wills, not one of them fully covers the exceptional state of facts and circumstances to be considered in arriving at the real intention of the testator by this remarkable instrument. He made his will only a few days prior to his death. He left five children by his first wife, and two by his last. His family relations had always been pleasant, there being apparently no petty jealousy existing between his two sets of children, all of whom were well brought up and respectable. He had apparently no partiality for any of them. By their aid he had accumulated a handsome property. By the first paragraph of his will he gave the use of all his property to his wife during her life, an ample provision for her, and emphasized his intention by saying that such use was "for her own personal benefit during the term of her natural life." By the second paragraph of his will he gave all that might remain of his estate at her death to his seven children, naming each, share and share alike. By the third clause of his will he gave to his two eldest sons, executors, full authority to sell and convey his real estate, with the concurrence of his widow, and convert the same into money as might be deemed by them to be for the best interest of the said estate. The extraordinary

provisions of his will are in the fourth clause, which provides that no appraisement of his property shall be required at his death; but that his whole property, its management and use, shall immediately vest in his said wife and be subject to her absolute control during her lifetime, and that she should not be subject to any accounting therefor.

I have ordered an appraisal of the personal property, which has been made and filed, and hold that the clause declaring that she shall not be subject to any accounting for the property of her deceased husband is nugatory and void, as against the policy of the law and contrary to the whole context of the will. The case of Smith v. Bell, 6 *Pet.* 68, in which the very learned Chief Justice MARSHALL, of the United States Supreme Court, writes the opinion, appears to cover the whole line of legal controversy and argument in this case, and such authority is approved by our own Court of Appeals in the very recent case of Crozier v. Bray, 120 *N. Y.* 366. The case quoted and decided by the United States Supreme Court came up from the seventh circuit and district court of East Tennessee; the property involved being goods and chattels consisting of a negro woman and her four children, all slaves. The will gave to testator's wife all his personal estate "to and for her own use, benefit and disposal, absolutely; the remainder of the said estate after her decease, to be for the use of the said Jesse Goodwin" son of the testator. The court held that the wife took an estate only during her life, and the son took a vested remainder; yet in that case the words "during the term of her natural life" and "dur-

ing her lifetime" appearing in the first and fourth clauses of this will, were not in that will, but the court held that the remainder of the said estate after the decease of his wife, to be for the use of the said Jesse Goodwin were equivalent thereto. I direct decree holding that the widow in this case takes only a life interest and use of the personal property of her deceased husband, to hold same in trust for her necessary support and maintenance during life; and it appearing that this is only an intermediate accounting, and that the time for the presentation of claims against the estate has not yet expired, and that there are debts due the estate not paid, and all parties interested having appeared personally or by attorney, and consenting, the further proceedings herein are adjourned to November 26, 1890, and all questions relating to commissions and costs of the respective parties are reserved until that date.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—September, 1890.

MATTER OF MONROE.

In the matter of the application for the probate of the will of THOMAS J. MONROE, *deceased.*

Testator was at the time of the execution of his will about seventy-three years of age. He was very feeble in body and had been for several years so mentally weak as to be unfit to give testimony in a legal proceed-

ing. He had sixteen years before made a will in favor of his wife and her niece, with both of whom he continued on affectionate terms. To neither of them had he expressed any intention of changing his will, nor were there any circumstances which might naturally lead to such a change. The present will, which was drawn up under the direction of proponent, and whose execution was superintended by him, left everything to him, who was an entire stranger in blood. It stated that it was made to reward proponent for his services to testator, but there was no proof that he had rendered such services. At the time of the execution of the will, proponent, who had entire charge of the property of testator, had obtained complete dominion over him, and sustained to him the closest confidential relationship. Although opportunity was offered him, proponent did not explain the suspicious circumstances surrounding his conduct. *Held*, that in such case the law presumes undue influence, and that it was incumbent upon the proponent to satisfy the court that undue influence had not been exerted. *Further held*, that in the absence of such proof by proponent the will would not be admitted to probate.

Legal advice given in casual conversations in the street for which compensation is neither asked for nor expected, is not a privileged communication.

APPLICATION for the probate of a paper alleged to be the will of Thomas J. Monroe, deceased.

The facts appear in the opinion of the Surrogate.

ERASTUS F. BROWN, *for* GEORGE C. GRENNELL, *proponent.*

BOORAEM, HAMILTON & BECKETT, *for* SUSIE M. PAGE, *contestant.*

CHARLES A. FLAMMER, *for* CHARLES C. MONROE, *and others, contestants.*

KNEVALS & PERRY, *for* EDWARD W. KNEVALS, *temporary administrator.*

THE SURROGATE.—It is impossible for me to take the time from other equally important official work that would be necessary to write my review of the testimony taken in this case by an assistant to the Surrogate. The record is enormous, and the printed briefs and supplements thereto handed up, contain nearly a thousand pages. The oral argument con-

sumed seven entire days, and was followed by me with great care and the taking of copious notes. The industry and ability of contestants' counsel have been extraordinary. They have signally aided me in my efforts to rightly decide the questions involved. The proponent's counsel has labored indefatigably, and has displayed a determination to leave nothing unsaid or undone which might, in his view, properly aid his cause. He was his client's chief witness, and his testimony is saturated with the bias, prejudice and zeal in his client's behalf, justifiable in counsel, but unworthy in a witness.

I have reviewed the case since the argument with care, and have given close study of the briefs. The objections to probate of the paper in contest are all those usually made to put in issue the factum of a will. The allegation of Susie Monroe Page by her special guardian and leading counsel for the contestants, that the paper in contest "was obtained, and the execution, re-execution or re-publication thereof procured by and secured by fraud, circumvention and undue influence practiced upon decedent by one George Grennell, the sole surviving legatee and devisee, executor, trustee, and sole beneficiary under said alleged last will and testament, or some other person or persons associated with said Grennell, or otherwise, whose names are at present unknown to this contestant," presents the question which seemed to counsel on both sides to be the only one in the case, and I agree. The formalities required by law for the due execution of wills were observed.

For several years before the execution of the paper

in contest the decedent, an old man, had been in failing health, and for some months immediately preceding the execution of the paper he was broken down, could not wait upon himself, could not dress himself mornings, could not prepare his food at the table, and was so feeble that he could not go up stairs unless a person went up behind him. He was not allowed to go down cellar because his attendant was afraid he would fall. His attendant, a woman, after August, 1886, stayed and put him to bed every night, and sometimes stayed as late as two o'clock in the morning. These duties were performed by this serving woman until he died, January 15, 1889, in his seventy-fourth year. Credible evidence was given that as far back as 1884 the decedent betrayed such mental weakness and decay as to unfit him for use as a witness in a legal proceeding. He was married, and outlived his wife but a few months, who was at the time he executed the paper in question seriously ill and very near to death, as he and his friend, the proponent, knew, and she died July 20, 1888, but a few weeks after the pretended re-execution by him of the paper in question. She had been living apart from him for some months with her niece in Williamsburg, with his consent; her absence being due solely to an attack of sickness while on a visit to this niece, which alone prevented her return, and such sickness resulted in her death. During all this time her husband displayed his love for her in the natural way of solicitude and providing support and maintenance. His own poor health prevented him from visiting her. In 1873 he made a will in favor of his wife and his niece.

This will was made in triplicate, and one part was given by him to this niece, Mrs. Blaisdell. This will was consistent with his affections and inclinations, and was pleasing to his wife, and he never disclosed to either of them any intention to change it, nor did there ever arise subsequent to its execution any controversy between him and them. His love for his wife lasted through life, and in his last days he expressed the wish to be buried by her side. No satisfactory reason has been given for his change of testamentary intent. The expressions in the paper in contest, to the effect that the entire estate should go to proponent as a reward for his services to decedent, are not sustained by proof of such services. The proponent is a stranger to the blood of the decedent, and it is not natural that he should have been selected by him as the person to receive his large fortune. The ties of blood are not usually disregarded, and whenever they are the act is deemed unnatural, and a suspicion is cast upon the favored stranger.

The paper in contest was practically drawn by the proponent himself, and its execution was superintended by him at a time when he had obtained complete dominion over the decedent, and sustained to him the closest of confidential relations, and was, in legal meaning, holding a fiduciary relation to him. The preparation of the contested paper by proponent's attorney and witness, at his request, from a "memorandum" or "draft" furnished by him, is fairly established. The attorney swears that he returned this "memo," or "draft" to his client, and the client swears that he did not do so. Between them this im-

portant paper has disappeared, and no satisfactory account of it has been given, although on the argument proponent's attorney affirmed that the proponent, who was then present in court, could answer fully in regard to it. I gave proponent the opportunity to go upon the stand then and testify to me on the subject, but he did not embrace it. The charge made against the proponent is very serious, and one would expect him to meet it square in the face. In such a case the fullest investigation should be courted, and all technical rules of evidence might well be waived. Any other course by a person charged with having defrauded a feeble old man of his free will to his own enormous advantage, rightly casts suspicion upon him, and strengthens the legal presumption that he is guilty. The professional obligation of an attorney to keep his client's confidence is grounded on public policy and good morals, and is made imperative by statute; but in a case of this kind the statute should be construed with liberality. I am not at all satisfied that the learned assistant to the Surrogate, in some of his rulings, was free from legal error in sustaining the objections made on behalf of proponent, who was personally present, to the evidence of the witness who claimed to be his attorney because he had been consulted by him on the street and at the lunch table about drawing a will for decedent. Sidewalk advice from attorneys upon legal questions, for which no compensation is asked or expected, and none given except a luncheon, should not be regarded as a privileged communication.

Whatever may be thought by others on the sub-

ject, it seems to me that in a case like this there is a higher law that should have compelled the proponent to promptly waive any privilege, and thus let the whole truth be known. Any other course on his part invites and justifies unfavorable comment. At this place I remark that proponent earnestly charged this attorney not to betray him to decedent. If all was frank and fair, why do this? This attorney had been for more than a generation the trusted counsellor of decedent, and he drew his will of 1873. He had also been the attorney of proponent for many years. If all was open and above board in regard to this pretended will, why was he, apparently, excluded from decedent's counsels, and a comparative stranger employed by proponent at his own expense? When a charge such as that made against this proponent is under impartial investigation, the respondent should, it seems to me, display the utmost frankness. In this case such has not been his conduct. The evidence convinces me that he early formed the purpose of procuring from decedent a will in his own favor, and to accomplish his design he bent every energy, resorted to artifice and cunning, conspiracy and fraud. For such purpose he traded upon the weaknesses, both mental and physical, of the decedent, and insidiously intruded his own will into his enfeebled mind, flattered his more than childish vanity and humored his caprices and eccentricities, and thus accomplished his object.

The kind of undue influence which the proponent exercised over this decedent is aptly described by the Court of Appeals in Marx v. McGlynn, 88 *N. Y.* 357: "That is where the mind and the will of the testator

have been overpowered and subjected to the will of another, so that while the testator willingly and intelligently executed a will, yet it really was the will of another, induced by the overpowering influence exercised upon a weak or impaired mind. Such a will may be procured by working upon the fears or the hopes of a weak-minded person; by artful and cunning contrivances; by constant pressure, persuasion and effort, so that the mind of the testator is not left free to act intelligently and understandingly."

In a case like this the law presumes that undue influence has been used, and it is incumbent upon the person charged with using it to satisfy the court that he did not. This rule of decision commends itself to one's notions of natural justice, and to the lay mind it is wholesome doctrine. The books abound in cases affirming this rule, and on several occasions I have called attention to them by name. It does not seem necessary to do so again.

It is needless to say that the proponent has failed to satisfy me that the paper in contest is not really his own will, procured by his undue influence over the decedent.

The paper propounded must be rejected. The costs of the proceeding are charged against the proponent personally.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—September, 1890.

MATTER OF REED.

In the matter of the application for the probate of the will of WILLIAM A. REED, *deceased.*

The will of testator was executed June 16, 1887. It complied with the statutory requirements as to execution and the witnesses testified to the essential facts, and that testator was at the time of such execution perfectly sober and rational. At various times prior to the execution of the instrument, extending over a period of about four years, testator was much addicted to drink. In July, 1885, a jury found him to be a habitual drunkard, and that he had been such for two years. He was committed to a State Asylum for the Insane where he remained about eleven months, being then released on trial, but was re-committed to the asylum until the further order of the court. Being released finally, his bad habits continued in 1887. He was twice committed for drunkenness to the Penitentiary on Blackwell's Island in the first part of May, 1887, and had only been discharged from the island the day before the execution of the will. The will bequeathed and devised his entire property to a nephew from whom, and from whose family, he had received kindness. After the execution of the will his bad habits returned, and in 1889 he was several times admitted to hospitals suffering from alcoholism. He died December 29, 1889. There was nothing to show undue influence except the fact that the present will, as well as a previous one, was written under the direction of the sole legatee. During the two years and a half intervening between the execution of the will and his death, testator made several declarations that the will conformed to his wishes. *Held*, that these facts furnished no proof of mental incompetency or undue influence, and that the will should be admitted to probate.

A drunkard may make a valid will even if at the time of its execution he is under the influence of liquor, provided he comprehends the nature, extent and disposition of his estate, his relations to those who have, or who might have, a claim upon his bounty, and is free from undue influence, fraud or coercion.

APPLICATION for the probate of the will of William A. Reed, deceased.

MATTER OF REED.

The facts appear in the opinion of the Surrogate.

ALFRED W. KIDDLE, *for proponent.*

WILLIAM P. WILSON, *for contestant.*

JULIUS M. MAYER, *for legatee.*

E. J. KNAUER, *special guardian.*

THE SURROGATE.—The paper propounded as the will was executed June 16, 1887. By it the decedent bequeaths his estate to a nephew, T. Eugene Smith. Objections were filed by John O. S. Reed, a nephew, and by the special guardian of Margaret E. Reed, a niece, who are named as legatees under a will executed on the 22d of March, 1887, less than three months before. The objections alleged are non-execution, mental incompetency, circumvention, undue influence, constraint and coercion.

The instrument was properly executed. Each subscribing witness testifies to facts essential to the execution, though there are slight differences of statement as to the manner in which the declaration was made. While Salmon, one of the witnesses, first swore that the word "will" was not used at the time, he afterwards recollected that it was. It does not appear that the paper was read to or by the decedent at the time, but there is sufficient evidence in the case to justify the belief that he knew its contents.

The allegation of mental incompetency is based upon the fact that the decedent was addicted to the excessive use of intoxicating liquors, of which there is abundant proof, his appetite being so strong that at times he was powerless to resist it, and at different

periods in the latter part of his life, by reason of his weakness, he was arrested and committed to public institutions. He died December 28, 1889.

A drunkard may make a valid will, even if at the time of the execution of the instrument he is under the influence of liquor, provided he comprehends the nature, extent and the disposition of his estate, his relations to those who have or might have a claim upon his bounty, and is free from undue influence, fraud or coercion. Peck v. Cary, 27 *N. Y.* 9; Gardiner v. Gardiner, 22 *Wend.* 526; Van Wyck v. Brasher, 87 *N. Y.* 260.

The testimony of the subscribing witness, Salmon, is that the testator was, at the time the will was executed, quietly and neatly attired, presented a good appearance, seemed perfectly rational, and he discovered no odor of liquor about him and saw nothing to lead him to doubt that he was perfectly sober. The witness was a student in the law office of Smith & Vosburgh, of which firm the sole legatee was a member. He had seen the decedent previously, but he had no acquaintance with him. Spillane, the other witness, was a notary public, having an office in the same building, and he had known the decedent by sight, having often seen him going up and down in the elevator, and he states that he appeared to be "perfectly rational, a decent and respectable looking man and a gentleman." The facts that transpired on the occasion of the execution are consistent with the inferences of the two witnesses. It is certain that for about three weeks previously he had had no opportunity to indulge in liquor, as he was confined in

an institution until the day before the paper was executed.

But the question of his habits of drinking have an important bearing in considering the allegation of undue influence in the procurement of the will, and in this aspect I must consider the extent to which he was addicted to the vice. In July, 1884, he took up his residence at El Mora, New Jersey, with Mrs. Reed, the widow of his brother, and he remained much of the time until the early part of May, 1887. Mrs. Reed testifies that he would go on protracted sprees. In July, 1885, a judicial inquiry was had in respect to his habits, and on August 14th of that year a jury found him to be an habitual drunkard and incapable of controlling and managing himself, and that he had been so for two years. These proceedings were confirmed on the 25th of that month, and, subsequently, letters of guardianship were issued to Mrs. Reed's son, John O. S. Reed, one of the contestants, on whose application the chancellor, on December 26th, 1885, directed the guardian to place him in a State Asylum for the Insane. He was subsequently released on trial, June 8, 1886. Later in the same month, further application was made to the chancellor by the guardian, setting forth that since his release the decedent had been continuously intoxicated, had lost his clothing, and was unable to take care of himself, and praying for a decree to commit him to the State Asylum at Morris Plains. In support of the petition was the affidavit of T. Eugene Smith, the sole legatee under the will in question, stating that, on the 19th of June, the deceased had appeared at his residence in

an intoxicated condition and had been continuously intoxicated since, had pledged his clothing, and deponent believed him to be utterly incompetent to take care of himself. On June 24, 1886, he was committed to the asylum until the further order of the court.

Mrs. Reed states that in the early part of May, 1887, the decedent left her house in an intoxicated condition. On the 8th of May, as appears by official records, he was committed to the Work House on Blackwell's Island for ten days for intoxication, and was discharged May 17th. He stated at the time of his commitment he was born in the United States, was a clerk by occupation, single, a Protestant, 44 years of age, and had been committed five times previously. The records of the Work House show, also, that on May 25th, one Michael Reardon was committed in default of $400 bail, for disorderly conduct, for one month, but was discharged June 15th. This was the day preceding the date of the will. He gave his residence as Elizabeth, his occupation that of teacher, single, a Protestant, 44 years of age, and he stated that he had been committed four times previously. The identity of the decedent with Reardon seems established by his own statement to Eugene Smith, that he had been committed to the Island under the name of Michael R. Smith, remembering only the initial letter of the last name, but the description of his profession, his age and residence, conforms generally to the facts shown in the case, and I have no doubt that Reardon and Reed were one and the same. Subsequently, in the summer of 1887, the decedent fractured his leg, and was at the house of Eugene Smith's

father. When he had sufficiently recovered, during the absence of Mrs. Smith in Europe, he purchased the supplies for the household, and the uniform testimony is that he continued sober until the first day of October, 1887, when the witness Palmiera, a student in the office of Smith & Vosburgh, first saw him, and thenceforward, Palmiera states, that he never saw him when he was not under the influence of liquor, and Smith himself testifies that the decedent was drunk about Thanksgiving time of that year. I find no satisfactory evidence of his being much addicted to drink thereafter until the summer of 1888. In September of that year he called, when intoxicated, on Mrs. Reed, at her home in New Jersey, but remained only one night. He desired to be taken care of, but the family declined on account of his habits, and he left for the city.

The records of Bellevue Hospital show that the decedent was admitted to that institution May 28th, 1889, suffering from alcoholism, and that he was discharged June 3d; that on June 5th he was admitted to Ward's Island and discharged the same day; that on June 25th he was again admitted to Bellevue Hospital, and was afterwards discharged; that July 28th he was again admitted to the alcoholic ward, and discharged the 29th, and was transferred to the Homeopathic Hospital on Ward's Island, suffering from alcoholism and diarrhea. August 25th he was again admitted to the alcoholic ward, and on the 28th was discharged improved, the disease being alcoholism and chronic diarrhea.

The persistent indulgence for years in alcoholic

stimulants has the effect to weaken the mind and to make it susceptible to the influence of persons who may have improper designs against the person or his estate, and it is in this aspect only that the question of the decedent's habits are to be considered, for, as previously stated, I hold that he was competent at the time of the execution of the paper.

The decedent had made two wills previous to the one now in controversy, one in 1886, in favor of Eugene Smith, which was produced and was shown to be in the handwriting of Smith, who states that it was drawn at the request of the decedent, and in accordance with his wishes. Subsequently, on March 22, 1887, while residing with Mrs. Reed in El Mora, a second will was drawn by an attorney and duly executed, by which his estate was given to his nephew, John O. S., and his niece, Margaret Reed. Then, on the 16th of June, the will in question was executed, and by it Eugene Smith was again made the sole legatee. Smith states that this instrument also was drafted by him from instructions given by the decedent, and that from the draft the executed paper was copied.

In the case of each will the motive for its execution seems to have been a sense of gratitude for kindnesses rendered. Smith and his parents had given him money from time to time and purchased clothing for him. Mrs. Reed, though, paid for his support and maintenance in her house, and cared for him, but found the office a burden. He stated to Theodore E. Smith, the father of Eugene, that he was often furnished with liquor by Mrs. Reed at their home, and

John O. S. Reed confirms the statement; but it is evident that they sought to regulate his use of stimulants, under the belief that it would be impossible to deprive him of them entirely, and it is probable that under a sense of obligation for their kindness he made a will in favor of John O. S. and Margaret Reed. I am convinced that he knew the necessity of being under influences that, if possible, would keep him from temptation. He was kindly treated by Eugene Smith and his parents, and he made a will in Eugene's favor. When in New Jersey and receiving kind attention from Mrs. Reed and her son and daughter, he made another, making Mrs. Reed's children the legatees. He became impatient of the restraint which they rightly imposed upon him, and left their home, and went from bad to worse until discharged from Blackwell's Island, June 15th, and he came at once to Eugene Smith, who cared for him and advanced him means, and then, with the same motive, he executed the will in question in Eugene's favor. When, a year later, he applied for admission into Mrs. Reed's house, if he had been accepted it is probable that he would have made still another will in favor of his nephew and niece.

I find nothing in the case to sustain the allegation of undue influence in respect to the execution of either instrument, except that the wills of 1886, and June 15, 1887, were written by or under the direction of the sole legatee. But the declarations of the decedent subsequent to the making of the will in contest, extending over a period of two and a half years, show that the paper conforms to his wish. He told Wen-

dell in September, 1888, that he had made a will in favor of Smith. He made the same statement to Mayer, and expressed his gratitude for the kindness Smith had shown him. To Mrs. Smith, his sister, and the mother of Eugene, he made a similar statement. Whatever presumption of undue influence existed by reason of the legatee being the draftsman of the will under which he takes the entire estate, has been removed.

A decree admitting the paper to probate may be presented.

ORANGE COUNTY.—HON. ROSWELL C. COLEMAN, SURROGATE.—October, 1890.

MATTER OF WARREN.

In the matter of the estate of WILLIAM L. WARREN, *deceased.*

Testator bequeathed to his wife the use interest and income during life of the residue of his estate, with the remainder over as to principal. A part of the personal estate consisted of bank stock. After testator's death, the bank reduced its capital stock by returning to its stockholders one half thereof, and declared a dividend derived from earnings of forty per cent on the one half returned of the capital stock. Regular semi-annual dividends were declared and paid upon the stock both before and after the reduction. *Held*, that the forty per cent dividend was income which was payable to the widow.

JUDICIAL settlement of the account of the executor of William L. F. Warren, deceased.

MATTER OF WARREN.

E. L. FANCHER, *for* CAROLYN C. VERMEULE.

E. A. BREWSTER, *for* ALIDA J. *and* WILLIAM W. CARPENTER.

HOWARD THORNTON, *for* CATHARINE WARREN.

THE SURROGATE.—The testator, William L. F. Warren, died in November, 1879. At the organization of the Newburgh National Bank in 1864, he subscribed for and became the owner of 50 shares of the capital stock, for which he paid $5,000, its par value. At the time of his death he was still the owner of this stock, and the executor and trustee under his will retained the same until June 15, 1890, when the capital stock of the bank was reduced one half. On the 27th of January, 1890, the directors passed the following resolution: "Resolved, that in the opinion of the members of the board it is expedient, and they recommend, that the capital stock of this bank be reduced from $800,000 to $400,000 by returning to the stockholders $400,000 of the capital, with a premium of 40 per cent payable out of the surplus and profits." And on June 9, 1890, they also passed the following: "Resolved, that the cashier be and he is hereby authorized and directed to transfer $80,000 from the account of surplus fund, and place the same to the credit of 'profit and loss.' Resolved, that a dividend of forty per cent on the one half of the capital stock of $800,000 to be returned to the shareholders be declared and payable to the shareholders on and after June 16, 1890." Shortly after the executor surrendered to the bank the certificate for fifty shares of stock and received from the bank a new certificate for twenty shares and $3,500 in cash. Regular semi-

annual dividends have been declared and paid by the bank up to and since the reduction of the capital stock. Upon the hearing, the president of the bank testified that the forty per cent was paid from the accumulated earnings of the bank. The will of the deceased contains the following clause: "I also give and bequeath to my said wife, the use, interest and income, during the term of her natural life of all the rest and residue of my personal property and estate" with the remainder over as to the principal. The executor still retains $1,000 of the money paid him by the bank, being the forty per cent dividend, and on the settlement it is claimed on behalf of the widow that it should be paid to her as income, derived from the $2,500 capital returned, and to this the remainder-man objects, and claims that it should be considered capital. To whom the $1,000 belongs, whether to the life-tenant or to the remainder-man must be determined by the construction to be given to the clause in the will quoted. I think it may properly be inferred that the testator supposed that after his death the bank stock would form a part of his estate; and it is also properly assumed that he knew when he provided that his widow should receive the income from his estate she would not have any right in or to the earnings of the bank until a dividend was declared, though the bank might earn thousands, and might defer dividing for years; but that whenever a dividend was declared, such dividend became at once income to the estate; whether it was paid from earnings made by the bank since the death of the testator or before that time. Hyatt v. Allen, 56 *N. Y.* 553;

Matter of Kernochan, 104 *N. Y.* 618. I therefore conclude that the true construction of this clause of the will gives to the widow as income of the estate any dividend of earnings properly declared by the bank upon stock belonging to his estate. This payment of 40 per cent on that part of the capital of the bank which was retired was however an unusual and extraordinary dividend, and there may be a doubt whether it is to be considered as a dividend of earnings to the shareholders, or whether it should not be considered a payment back to the shareholders of capital. The bank in one resolution proposes "to return" to the shareholders $400,000, "with a premium of 40 per cent payable out of the surplus and profits." And again it is resolved "that a dividend of 40 per cent" on the capital to be returned "be declared and payable to the shareholders." The bank, by its action, could have capitalized its surplus earnings, or it could have divided its earnings among the shareholders in the form of dividends. It had the power to do either, and whether its action was one or the other, determines whether the $1,000 was a part of the capital or income from the capital. Until the proceedings were taken by the bank, the surplus earnings belonged only to the bank. By its proceedings, the shareholders acquired a right to so much of the surplus as the bank determined to part with. Did the bank give up this part of its surplus as capital or as earnings? I conclude that it was as earnings. It was determined by the bank to return to the shareholders a portion of the capital they had in the bank, with a "premium" or "dividend," or whatever you

may choose to call it, but, whatever it was, it was payable from the "surplus and profits," and the amount was directed to be taken from the "account of surplus funds." It was recorded in the books of the bank as a dividend, and paid out as such. I am of opinion that the widow is entitled to this sum of $1,000 as income derived from the bank-stock.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—November, 1890.

MATTER OF WATTS.

In the matter of the estate of SIMON WATTS, *deceased.*

A decree judicially settling the account of an executor will not be reopened upon allegations on the part of the executor that he has by error charged himself as executor with assets which do not belong to the estate.

THE deceased left a will of which his widow, Sarah Watts, and Edward F. Gaylor, his son-in-law, were the executors. Gaylor took sole charge of the management of the estate. He was cited to render an account of his proceedings as such, and the proceeding resulted in a decree in July, 1890, which adjudged that he had in his hands a balance belonging to the said estate amounting to $20,853.50. The executor has now made application for an order modifying the decree by deducting from said balance the sum of

$6,841.34 with interest thereon, on the alleged ground that the same was not a part of the assets of the deceased, but was a gratuity fund paid to the family of the deceased by the trustees of the New York Produce Exchange of which the deceased was a member.

A. J. ADAMS, *for the motion.*

WM. H. ROBERTSON, *opposed.*

THE SURROGATE.—It is now made to appear that the amount which the executor seeks to have deducted from the balance in his hands, as fixed by the decree, was a sum given to the widow and children of the deceased, by what is known as the Produce Exchange in the city of New York, through the trustees of what is called the gratuity fund. Section four of the rules and by-laws thereof reads as follows: "Nothing herein contained shall be construed as constituting any estate *in esse* which can be mortgaged or pledged for the payment of any debts, but it shall be construed as the solemn agreement of every subscribing member of the New York Produce Exchange to make a gift to the family of each deceased member, and of the Exchange to collect and pay over to such family the said gift." This is the only provision to which the attention of the court is called. It would seem that the trustees of the fund gave checks for the sum to which the widow and children were each entitled, and that the executor procured their endorsement thereof, obtained the money and used it for his own purposes, whether with or without the consent or knowledge of the payees is deemed immaterial. He fully knew the

source from which the money was derived, and that it did not belong to the estate as assets. And yet, he included the amount in the inventory of the assets he caused to be filed, and charged himself with the same in the account of his proceedings which he rendered. There was a contest regarding some items of the account, but none whatever concerning this. The court was in ignorance as to the derivation of this fund, and was bound to regard it as a proper legal charge made by the executor against himself. The contest resulted in the account being adopted as rendered, and a decree was entered accordingly. On the facts before it, this court clearly had jurisdiction in so far as this sum is concerned. The learned counsel for the executor claims that it had not, and cites the Matter of Brooks, 5 *Dem.* 326; Greeno v. Greeno, 23 *Hun* 478; Brown v. Catholic Mutual Benefit Ass'n, 33 *Id.* 236; Hellenberg v. B'Nai Berith, 94 *N. Y.* 580, in support of his position. But in those cases the point was not made, and they were arrested by the question at a stage of the proceeding where it could be properly considered, while this case has entirely passed beyond such stage. Had the executor failed to charge himself with it and the contestants insisted that he should, then the matter would have been open for consideration, the court would have had jurisdiction to determine it, and would, doubtless, have held that it was not properly chargeable against the executor as such. But he here seeks to set aside a decree because it charges him with a sum he confessed, in his account, with a full knowledge of all the facts, to belong to the estate.

But this court does not seem to be authorized by § 2481 of the Code to open the decree, on the ground urged. No fraud, newly discovered evidence, clerical error, or other like sufficient cause, is alleged. See Olmsted v. Long, 4 *Dem.* 44. The executor knew all the facts when he filed his account. The error, if any, was one purely of law, and that has been held not to be a sufficient cause. *In re* Dey Ermand, 24 *Hun* 1.

There is less reluctance in denying this motion for the reason that the only difference it can make to the executor is the mode of enforcing payment. In any event, his liability for the amount continues.

Motion denied.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—November, 1890.

MATTER OF SMITH.

In the matter of the judicial settlement of the account of JOHN W. COCHRANE, *as administrator of the estate of* WILLIAM SMITH, *deceased.*

An accounting party is not confined to sections 2561 and 2562 of the Code of Civil Procedure in remunerating his counsel, but may expend such sums as he deems proper in that behalf, to be included in his accounts, and the correctness and propriety of which may be contested by the persons interested.

But to justify such items in an account it must appear that services beyond the ordinary preparation of the account, or for trial, were rendered and were necessary.

MATTER OF SMITH.

JUDICIAL settlement of the account of John W. Cochrane, administrator of the estate of William Smith, deceased.

EVARTS, CHOATE & BEAMAN, *for administrator.*

M. M. BUDLONG, *for contestants.*

THE SURROGATE.—The sole objection raised to the account under consideration is the item therein for services of counsel. The *gravamen* of the objection is that these services were rendered in a proceeding for an accounting, and that the personal representative is confined to sections 2561, 2562 of the Code of Civil Procedure, for remuneration of his counsel. In other words, that, without regard to the value of the services rendered, the character of the litigation, the size of the estate, the question of the amount involved, he can pay his counsel not exceeding $10 per day for the actual number of days spent upon the accounting, and that, if he does compensate him at a higher rate, he cannot be indemnified from the funds of the estate. In proceedings in the Surrogate's Court, it is very frequently the case that the services rendered are amply compensated by the statutory allowance, and it may happen in some instances that an allowance up to the limit prescribed would be excessive, but the cases are numerous where the allowance which the Surrogate may make upon the entry of decree, by way of costs, is grossly inadequate. In 1 Connoly Surr. Rep. 564, the Surrogate, in his remarks to the bar, commenting on the impossibility in every instance of compensating counsel by an allowance made by way of costs on

the entry of decree, said: "It is the duty of the executor to employ and pay, as a matter of independent private contract between himself and the attorney, such compensation as the attorney fairly earns, and that amount of money should go into his account, and, when presented, would be allowed by the Surrogate out of the estate, if fair and reasonable. It is a misapprehension on the part of the bar to suppose that attorneys can get adequate compensation under what is known as 'a *per diem* allowance.' . . . . They should have obtained their pay from their clients before, and put it in the account." And it is the practice to require information upon this point upon the entry of the decree; for, in taxing costs, the Surrogate of this county requires information upon the question whether compensation has been paid out of the funds of the estate for or on account of the services specified in the bill, and the printed form of affidavit supplied in this court contains an averment on this point. In Matter of Bailey, 47 *Hun*. 477, the General Term, Judge PARKER writing the opinion, say: "While the authority of the Surrogate to award costs is thus limited by statute, executors or administrators are in no wise precluded from employing counsel to give them necessary legal assistance in the management of their trusts, or from compensating counsel according to the value of the services rendered. For payment so made, a claim may be made for reimbursement out of the funds of the estate." In this case, the services were rendered by the attorney, not for the protection and benefit of the estate, but they were solely for the benefit of the executor

in an action brought against him for misconduct in his office as executor, in which contest he was successful. Numerous cases have been cited by counsel for objector to support his contention. Matter of Clark, 36 *Hun.* 301, holds simply that an executor is entitled to trial days where a reference has been had in the same manner as if the trial had occurred before the Surrogate. Also, that the Code does not contemplate an allowance for days on which adjournments occurred without any actual hearing. It is apparent that the case is not pertinent to the point presented. In Harward v. Hewlett, 5 *Redf.* 330, the account contained a charge of seventy-five dollars for the expenses of final accounting and services rendered to the executor by his attorneys. Surrogate LIVINGSTON said: "The costs of this accounting have no place in the account, as they must first be fixed and allowed by the decree. If any charge is made for counsel fees paid in this proceeding, it should be separately stated, so that the court may judge whether it exceeds the limit fixed by section 2562 of the Code." Counsel for contestant refers to this case as the only one where the executor has taken the course pursued by the administrator herein. He evidently has not seen the decision of the general term in the Matter of Bailey, *supra.* The character of the services covered by the seventy-five dollars is not mentioned in the opinion, nor in the statement preceding the same, and we are therefore in the dark as to whether the services were such as would merit additional compensation beyond the costs to be awarded upon the entry of the decree.

Walton v. Howard, 1 *Dem.* 103, cited by counsel

for contestant as in favor of his contention, seems to me to be authority to the contrary. This is a decision by Judge ROLLINS, rendered in August, 1882, and is the first case wherein he considered the state of the law as to allowances, and sets forth at length his views with reference to the power of the Surrogate, under sections 2561 and 2562. After referring to those sections, and the restrictions imposed thereby, Judge ROLLINS says: "It need scarcely be said that the statute, which has thus regulated the authority of the Surrogate to award costs, does not preclude executors from employing counsel to give them necessary legal assistance in the management of their trusts, or from rewarding the services of such counsel according to their value, and without reference to the limitations of the Code of Civil Procedure. For payment so made, such an officer may, of course, present to the Surrogate his claim for reimbursement out of the funds of the estate. Such claim may justly form, as it often does form, one of the items with which he credits himself in his accounts, and, so presented, it is laid bare to the scrutiny of all persons interested in the estate, may be objected to, like all other items, by any party who chooses to contest it, and will be allowed, or disallowed, according as it is ascertained to have been a proper or an improper disbursement. Gilman v. Gilman, 6 *T. & C.* 214; affirmed, 63 *N. Y.* 41.

"Whether upon a final accounting such payment to counsel can ever be sanctioned as a charge against the estate when it recompenses services which have already been the subject of taxation by the Surrogate,

and for which the accounting party has been granted the statutory allowance, need not be here determined.

"All that is now necessary to maintain is the proposition that, however distinguished may be the counsel, and however valuable his services, the Surrogate has no power to award, under any circumstances, a larger compensation than ten dollars per day, in addition to seventy dollars.

"This is, no doubt, in many instances, a very meagre and insufficient award, far less than the court would feel bound to allow in the exercise of a wider discretion; but it is the maximum reward which the law has established, and that law, both in its letter and spirit, must be obeyed and respected."

The meaning of the Surrogate in the two paragraphs next preceding the last is not entirely clear. In my opinion, this case cannot be regarded as authority against the conclusion I have reached. The Surrogate expressly refrains from passing upon the precise point, but all the intimations therein are favorable to the conclusion I have reached. In Hall v. Campbell, 1 *Dem.* 415, the executors sought to retain from the balance in their hands $280 paid to a book-keeper for making up the accounts, in addition to counsel fees authorized by section 2562. This claim was disallowed. The case is not pertinent to this controversy.

Previous to the Revised Statutes, it was not the practice of the Surrogate's court to give costs in favor of one party against another in testamentary matters. Costs were given by the ecclesiastical courts of England in such cases, both in original suits and on appeals, but it seems that such a practice was never

adopted in this state. By the Revised Statutes, the legislature changed the law in this respect, and enacted the law as it existed in the ecclesiastical courts of England at the time of the settlement of this state. Although no fee-bill was expressly adopted by statute for advocates and proctors in the Surrogate's court, it was not the intention of the legislature to leave it to the several Surrogates to make an arbitrary allowance for services and counsel fees in each particular case, to be paid by one party to another, or out of the estate which is the subject of controversy, and without reference to the taxable costs allowed for similar services in other courts. In the taxation of costs and counsel fees of the proctors and advocates upon the settlement of the account of an executor or administrator before the Surrogate, the taxable charges therefor cannot exceed those which are allowed by law to solicitors and counselors in this court in similar cases. Halsey v. Van Amringe, 6 *Paige*, 18. This last case, it seems to me, recognizes the difference between allowances to be made to an executor for counsel fees as remuneration for services rendered, and the taxable costs which may be awarded against one party in favor of another. In other words, it recognizes the difference between costs, as such, and the sum included in the account for services rendered by counsel. While it would not be proper for the Surrogate to make an allowance of the character claimed in this case to be charged against a contestant, it would be proper for the executor to pay his counsel such amount, if justified by the proof as to services performed. To present the idea in a different form, should the Surrogate de-

termine that one or other of the parties to the contest should be charged with costs of the proceeding, he could only charge him with the taxable costs at the rate specified in the sections of the Code, and it would be improper to charge him with whatever sum might be a suitable reward for the attorney's services. This is in analogy with the procedure in common-law courts. A successful plaintiff, for instance, does not recover from the defendant for costs the entire sum which he, the plaintiff, may be required to pay his counsel, but only statutory costs. And it is elementary that costs are not intended as indemnity, but only partial reimbursement. In the case of Wilcox v. Smith, 26 *Barb.* 330, the court said: "It seems to be well settled that an executor or administrator is not entitled to charge the estate he represents with a counsel fee paid by him upon the final settlement of his accounts before the Surrogate, or for drawing up his accounts in a proper and legal form on such a settlement; and also that the Surrogate has no authority to make an arbitrary allowance to him in lieu of the compensation directed by the statute to be paid to advocates and proctors in Surrogates' courts, where the sum is to be paid as costs in the suit or proceeding, either by the adverse party or out of the fund in litigation. Burtis v. Dodge, 1 *Barb. Ch.* 77; Halsey v. Van Amringe, 6 *Paige*, 12; Western v. Romaine, 1 *Bradf.* 37. This rule does not conflict with the one, now statutory, which authorizes the Surrogate to allow executors and administrators 'for their actual and necessary expenses,' which are 'just and reasonable,' in the management of the estates committed to them,

(see 2 R. S. 93, § 58; Laws 1849, ch. 160;) such as expenses incurred by them in employing agents and clerks, where their services are beneficial to such estates, (McWhorter v. Benson, *Hopk. Ch.* 28; Vanderheyden v. Vanderheyden, 2 *Paige*, 287; Matter of Livingston, 9 *Paige*, 440, 2 Den. 575; Glover v. Holley, 2 *Bradf.* 291, 294;) and such as costs paid in actions brought by them in good faith to recover debts supposed to be due to their decedents, when the results show that different modes of proceeding would have been more beneficial to the parties interested in the estates. Collins v. Hoxie, 9 *Paige*, 81. The two rules already mentioned harmonize, and they are founded on solid reasons. It is not often that executors or administrators need the services of counsel in making final settlements of their accounts before the Surrogate, if they have properly managed the estates in their hands, and are diligent in making such settlements; and where they are negligent, or permit their accounts to become confused, or suffer the estates under their control to decrease unnecessarily, they ought to pay counsel out of their own funds for assisting them in closing up their trusts. And the reasons are too obvious to be stated which uphold the rule that permits the Surrogate to allow them all actual and necessary expenses incurred by them, which appear reasonable and just, in bringing and defending actions, in good faith, with the expectation of benefiting the estates under their control, and in managing such estates solely for the benefit of those interested in them." In Burtis v. Dodge, 1 *Barb. Ch.* 77, referred to by the court above, the executor charged in his account

$50 as a fee to his counsel upon final settlement. The court held, (page 91:) "Neither was the executor entitled to charge the estate with a counsel fee upon the final settlement of his account before the Surrogate, or for drawing up his accounts in a proper and legal form on such final settlement. The whole was a part of the proceeding for the settlement of the account of the executor; and the statute having fixed the allowances which are to be made to advocates and proctors in Surrogates' courts, when they are to be paid as costs in the suit, either by the adverse party or out of the funds in litigation, the Surrogate is not authorized to make an arbitrary allowance to the executor in lieu thereof. Here, the Surrogate had the power to award costs to the executor, to be paid out of the estate of the testator, or by Burtis personally, if he thought this final accounting had been rendered necessary by his perverseness. He has not thought proper to do so in this case, except to the extent of his own fees, which he has awarded against Burtis personally, by deducting them from the balance found due to him upon the accounting. If it was a proper case to allow the executor for the expenses of his proctor and advocate upon the accounting, the Surrogate should have taxed their costs at the rates of allowance fixed by the act of 1837." In Osborne v. McAlpine, 4 *Redf.* 6, Surrogate CALVIN took occasion to condemn the practice theretofore prevailing of making an allowance to counsel for executor, etc., on final accounting, to cover the professional services rendered during the progress of administration, and prior to the proceeding initiating the final account. He said: "If

the representative of an estate shall employ counsel, which he clearly has the right to do, it is the duty of such counsel to present his account for payment before the final accounting, and for the representative to fix upon the amount which is reasonable to be paid, and pay it on his own responsibility, and credit himself with such payment in his final accounting. This will enable the executor in the first place to scrutinize the charges, and will give the parties in interest an opportunity to interpose objections, if it shall appear to be exorbitant." In Carroll v. Hughes, 5 *Redf.* 337, an accounting party claimed credit for sums paid for counsel fees, and the Surrogate held that so much of the charge for legal services as related to the accounting must be separately stated, so that the court may judge whether it exceeds the limit fixed by section 2562 of the Code, and there should be proof by affidavit of the number of days necessarily occupied in preparing the account for settlement. In Matter of Miles, 5 *Redf.* 110, was an account had upon the application of a legatee. The petitioner and respondent were the only parties interested in the estate, and for that reason Surrogate CALVIN held that it was a "judicial settlement." He held that the executors were entitled to $25 and three days for preparing account, but that they were not entitled to any allowance for attendance at court, examination of the law, and the drawing and settling of the decree, for the reason that they were not devoted to "preparation for the trial." He says: "The theory of the codifiers seems to have been that the twenty-five dollars should cover all the proceedings, except the preparation of the account,

where no trial was had; unless, perhaps, where objections were filed, and reasonable preparations made, and, before the trial commenced, the objections were withdrawn." Chatfield v. Hewlett, 2 *Dem.* 191, was a contest over the substitution of an attorney. No question whatever was made but that the retiring counsel was entitled to a lien for whatever his services might be worth, independent of the *per diem* allowance under the Code. None of the authorities cited by contestant seem to maintain his position, and independent investigation has not disclosed any reported decision in conflict with the opinion I have formed.

Many of the problems arising in the preparation of the account could not be correctly solved by a layman, as, for instance, the marshaling of assets, to determine whether certain disbursements shall be charged against income or principal, the relative rights of life-tenants and remainder-men, questions as to dividends, and numerous other points that are frequently the subject of litigation, often requiring the construction of wills, any and all of which necessitate the advice of experienced counsel. Not infrequently the most eminent and experienced counsel in such matters differ as to their proper disposition. When we reflect upon the strict accountability to which such officers are held by law, and that the statutory commissions received by executors, administrators, etc., are meagre and entirely insufficient compensation for the services rendered, as has been frequently remarked in judicial decisions, it seems to me entirely improbable that the legislature intended that the provisions of sections 2561, 2562, of the Code were intended to indicate the

exclusive source of authority for compensation of counsel for work of this character. To maintain such proposition, it must be contended that in a large class of cases the administrator must take the grave responsibility of properly administering his trust for the meagre commission allowed by the statute, on the advice of counsel to whom he cannot pay more than $10 per day, or employ counsel upon whose reputation for learning he may confidently rely, and pay him from his own pocket. It must be remembered in this connection that executors, etc., are personally liable to their counsel, and cannot be made liable in their representative capacity, (Willcox v. Smith, *supra;* Mygatt v. Willcox, 1 *Lans.* 55; 45 *N. Y.* 306;) that an allowance made by the Surrogate for counsel is not conclusive as between the attorney and client, and the attorney may sue and recover from the executors the value of the services rendered, together with his disbursements. Mygatt v. Willcox, *supra.* It is by no means an uncommon occurrence that contests on the settlement of accounts would have been avoided had the proper investigation been made by counsel as to the state of the law before making up the same, where, if an experienced lawyer had been employed, the estate would have been saved referee's and stenographer's fees, the *per diem* of counsel, and other expenses incident to the contest of the account. Until I am differently instructed by the appellate courts, I shall hold that an accounting party is not confined to the sections of the Code (2561, 2562) in remunerating his counsel, but may expend such sums as he deems proper in that behalf, to be included in his accounts, and

the correctness and propriety of which may be contested by the persons interested. I am supported in this conclusion by the clear distinction made by the legislature in its provisions with reference to the allowance to special guardians and to the allowance made to an executor, administrator or freeholder on a sale of real estate. In the case of a special guardian, he has no client to whom he may have recourse for any recompense he may deserve outside of the statutory costs, and the Code, therefore, very properly allows the Surrogate to make him such allowance as his services merit, without a *per diem* or other limit. No restriction is imposed upon the Surrogate in making this allowance, for the reason that this is the exclusive source of compensation.

Having reached this conclusion, it remains for me to determine what services included in the voucher filed are of a character to merit this extra compensation. To justify such items in an account, it must appear that services beyond the ordinary preparation of the account, or for trial, were rendered and were necessary. An executor could not in an ordinary formal account, involving no intricate question, employ eminent and expensive counsel, and pay them extravagant fees. If the services beyond an ordinary trial or account were such that they could very well have been rendered by an attorney of average learning and ability, he cannot pay him large fees and be reimbursed therefor. On the other hand, if the estate is large, and the question at issue important, the accounting party is not limited to the employment of counsel, whose services may be obtained for a fee of ten dol-

lars per day. He may engage counsel equipped by learning and experience to conduct litigations of magnitude, and recompense him with a fee corresponding to his services and the interests at stake. In the case at bar, a considerable portion of the services included in the voucher, and testified to in greater detail on the trial were rendered strictly in the administration of the trust, and there can be no doubt whatever that they are allowable, unless the sums paid were excessive. Of this class were the consultations as to his conduct prior to the account, the transmission of funds abroad, the McCabe mortgage, and the tax matter. The proof as to services rendered is not as detailed as I would like in order to pass upon the propriety of the charge made, and I am compelled to some extent, to rely upon my own experience as to what labor must have been entailed by the proper conduct of the litigation. I believe, however, that a fee of fifteen hundred dollars in addition to the full amount of disbursements claimed, is sufficient recompense for the services shown to have been performed. This sum is fixed on my determination that no costs will be allowed on the entry of the decree for services up to the termination of the last reference.

MONROE COUNTY.—HON. JOSEPH ADLINGTON, SURROGATE.—December, 1890.

MATTER OF BIRDSALL.

In the matter of the application for probate of the will of BENJAMIN E. BIRDSALL, *deceased.*

Testator died leaving property of the value of $10,000. Before his second marriage, which was seventeen years before his death, he had given to each of his three daughters by his first wife, who were married and had separate homes of their own, the sum of $3,000. By his will he left to his second wife a legacy of $5,000. *Held*, that this legacy was not so unreasonably large as to raise a presumption of undue influence.

About thirty years before his death testator had an acute attack of insanity, from which he soon recovered. About nine years before his death he had an apoplectic stroke which affected his power of speech and for some five or six years he had suffered from a form of progressive paralysis which affected his powers of locomotion. There was also a gradual weakening of the mental and physical powers incidental to old age. But he conducted his ordinary business affairs with judgment and discretion, and there was not during his lifetime any attempt to have him declared incompetent to manage his affairs. *Held*, that he had testamentary capacity.

APPLICATION for the probate of the will of Benjamin E. Birdsall, deceased.

W. D. & C. A. SHUART, *for proponent.*

T. R. SHERWOOD *and* C. J. BROWNING, *for contestants.*

THE SURROGATE.—This decedent died in the town of Mendon, in this county, on the 22d day of April, 1890, at the age of 80 years. His first wife died in 1870. His three daughters were at that time all mar-

ried, and living in separate homes of their own. In 1873 he married his second wife, who survives him. Before his second marriage he had given to his three daughters $3,000 each. At his death his estate consisted of a farm worth about $10,000, and some personal property of little value. At about the time of his second marriage he said that he intended to settle on his wife the sum of $5,000; and that amount was bequeathed to her in a will made by him in 1887, and in the one now offered for probate, made in 1889, which is similar to the first in all respects, excepting a correction in the name of one or more of his grandchildren, who were the residuary legatees. His surviving daughters contest his will, and allege that he was mentally incompetent to make it, and that it was procured by the undue influence of his wife. There is not a word in the 450 pages of testimony to sustain the charge of undue influence. Nor is there any evidence that Mrs. Birdsall attempted to exert such influence in her own favor as a wife may fairly and legitimately use. The law is well settled that a wife or child may justly influence the making of a husband's or father's will in her or his favor, so long as no fraud is practised upon the testator, and he is not deprived of his free agency. Fair argument or persuasion is not obnoxious to the law. Latham v. Udell, 38 *Mich.* 238; Pierce v. Pierce, *Id.* 412; Blanchard v. Nestle, 3 *Den.* 37; Ewen v. Perrine, 5 *Redf.* 642; Tyler v. Gardiner, 35 *N. Y.* 559. The contestants insist also that the provision for Mrs. Birdsall is unreasonably large, and that the will is unnatural in that respect, but I do not so regard it. For nearly seven-

teen years Mrs. Birdsall had been a faithful wife and helpmeet. She had cared for him in sickness and in health, and appears to have managed well the affairs of his household. Three hundred dollars a year would not seem to be an extravagant compensation for such services, considered simply from a pecuniary point of view, and, certainly, $5,000 is a very moderate sum to provide for the comfortable support and maintenance in old age of an affectionate and faithful wife.

There remains, therefore, only the allegation of testamentary incapacity. There is sufficient basis of fact to make this claim plausible, though not enough to sustain it. About thirty years ago Mr. Birdsall had been confined for a short time in an asylum, on account of an acute attack of insanity, from which he soon recovered. Not far from 1880 he had suffered what the witnesses called "a stroke," probably of an apoplectic nature, which affected his vocal organs so that thereafter he could not speak as easily or distinctly as before. For the last five or six years he had also been suffering from a form of progressive paralysis, which had its seat in the spinal cord, and so affected his lower limbs as to make walking somewhat laborious for him, and occasionally causing him to stumble and fall. There was also the gradual weakening of the physical and mental powers incident to old age. Mr. Birdsall continued, however, to attend to his business affairs, leased his farm from time to time, sold his crops, made contracts for the sale of standing timber, and for transfer of a part of his land, and executed and delivered a conveyance thereof at about the time this will was executed. None of his family

ever seems to have regarded him as incapable of carrying on his business, or to have made any attempt to have him judicially declared incompetent to manage his affairs; but, now that he has died leaving a will that displeases them, they insist that for years before his death he was demented and imbecile. There is an erroneous impression largely prevalent among laymen, and to some extent among lawyers, also, that, though an infirm old man has abundant capacity to make contracts and to manage his ordinary business, he may yet be much too feeble mentally to make a valid will. Such doctrine, however, finds no countenance in law. In the celebrated case of Stewart v. Lispenard, 26 *Wend.* 255–306, it was said that a man's capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property; and, while it is safe to say that the courts of this state would not assent to the soundness of that proposition to-day, still one's ability to transact his ordinary business affairs with judgment and discretion, and to manage his property with reasonable prudence, would be considered very strong, if not conclusive, evidence of testamentary capacity. Coit v. Patchen, 77 *N. Y.* 536; Horn v. Pullman, 10 *Hun*, 472, affirmed, 72 *N. Y.* 269; Pilling v. Pilling, 45 *Barb.* 92; Crolius v. Stark, 64 *Barb.* 112. The Supreme Court of Michigan has taken a view of this question similar to that held by our courts, and has been somewhat more positive and precise in its statement of the rule than our own Court of Appeals. In Kempsey v. McGinniss, 21 *Mich.* 141, the

court says: "The rule settled by the weight of authority undoubtedly is that a less degree of mind is requisite to execute a will than a contract." This doctrine was, in substance, reiterated in Rice v. Rice, 50 *Mich.* 448–456, in an opinion concurred in by the learned counsel for these contestants, and in which it is further said that "a will is not to be set aside merely because its maker was weak or sometimes foolish, or lacked the average mental capacity of his neighbors." In Hoban v. Piquette, 52 *Mich.* 361, in an opinion also concurred in by the same learned counsel, the principle is enunciated in the following language: "In law one who is competent to deal in property on the basis of contract is competent to dispose of property by will. With surviving relatives there is often a different rule, and persons who have gone through an active life with business competency unquestioned are denied testamentary capacity the moment a will is produced which does not meet their desires or expectations." The same rule prevails in many other states. The testimony of the subscribing witnesses shows clearly the testamentary capacity of Mr. Birdsall at the time when this instrument was executed, and in this they are strongly corroborated by the testimony of various persons who had business transactions and conversations with him at about the same period. I am of the opinion that Mr. Birdsall was competent to make the will in controversy, and that it is a valid instrument. There may be a decree entered on five days' notice.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—December, 1890.

MATTER OF KIEDAISCH.

In the matter of the application for the probate of the will of ANDREAS KIEDAISCH, *deceased.*

In cases where from the infirmities of the testator or his impaired mental capacity, the usual inferences cannot be drawn from the formal execution of the will, additional evidence is required, and in such case the burden is cast upon the proponent, especially where one of the witnesses is dead and the other was a comparative stranger to testator, of satisfying the Surrogate beyond a reasonable doubt that testator was capable of executing a will at the time he executed the paper propounded, that he could comprehend the nature of his property, what it was, how situated and also appreciate and perceive the relations of those who were entitled to bounty and benefactions from him.

It is not necessary that a man should have the capacity to transact all kinds of business to be capable of making a valid will.

A man whose mental faculties are impaired or weakened even to a considerable degree is not *non compos mentis* within the legal definition of that term applied to making of will.

The testimony of experts upon the question of mental capacity, although admissible and a great aid to court and jury, can never be held to be controlling as against the testimony of intelligent persons who saw daily the person whose mental condition is in question and had with him transactions of a social and business nature.

The facts in the present case considered and held to show that the testator had a lucid interval at the time of the execution of his will.

APPLICATION for the probate of a paper propounded as the will of Andreas Kiedaisch, deceased.

Upon the probate of the will where the mental capacity of the testator was questioned, it appeared that the testator had been confined in the Bloomingdale

Asylum for the insane on the certificate of commitment of two physicians and that he was afflicted with a disease known as *general paresis*, in November, 1886, and that the testator remained there till October, 1887, when he was taken out by his relatives; and that subsequently and on the 4th of March, 1888, he intermarried with the proponent, a widow whom he had known all his lifetime and that thereafter on the 13th day of July of the same year he executed his will, giving his wife a life interest in his estate and upon her death legacies of five thousand dollars each to each of her two sons, and the residue of his estate to any issue of his marriage is in default of such issue to his brothers and sisters.

In June, 1889, he was again confined in an asylum at Amityville, where he had been sent again on the certificates of commitment of two physicians and where he remained with the exception of a few months until his death in April, 1890.

His relatives and a large number of the witnesses who testified against the testator's mental capacity about the time of his marriage were present at the wedding and enjoyed the festivities thereof and congratulated him upon the act. A large number of witnesses, called on behalf of the contestants, including some expert witnesses, impugned the man's capacity and represented him as incapable of executing a valid will, or of executing a valid contract of any kind, or entering into any business transaction, or performing any business act, from about the time he was sent to Bloomingdale until the time of his release, and the testimony of some of the witnesses on behalf

of the contestants establishes the fact that to their view and belief, he was insane and incapable to the day of his marriage; while a larger number of witnesses who were called on behalf of the proponent, among whom were the pastor who performed the marriage ceremony and a number of friends who knew him in the days of his youth, and others who had business connections with him, as also his neighbors, and who observed the testator from the time of his release from Bloomingdale, and for a period of more than a year after his marriage and who have had transactions with him of a social character and who had seen him daily and had repeated conversations with him on social and business matters, testified to his soundness of mind at the time of his marriage and at the execution of his will.

GEORGE HAAS, ERWIN I. SPINK *and* RICHARD M. MARTIN, *for proponent.*

EDWARD BROWNE *and* RABE & KELLER, *attorneys for contestants.*

THE SURROGATE (*orally*).—I have given very careful and painstaking attention to every word of the testimony in this proceeding, and I have listened with a great deal of interest to the careful statements, by both counsel, of the law, and in the main I agree with them. The duty of the Surrogate is made very clear by our statute. This proceeding presents but a single question of fact to be determined. It is conceded that the paper propounded as the last will of this decedent, Andreas Kiedaisch, was executed by him on the 13th day of July, 1888. It is also conceded

that he died in Amityville, a home for insane people, commonly called an "asylum," on the 14th day of July, 1890. What its precise name is I do not know, and it is of no consequence. There is no evidence of what disease or malady he died. I recall no evidence on the subject at all. It has, perhaps, been left for me to infer, from the fact that he was sent there under the commitment and died there, that he died an insane man. It is not necessary for me to express any opinion upon that subject at all, and I do not. I think it is entirely immaterial. The contest has been very carefully, very candidly, and very ably presented; and I have no doubt at all about the absolute good faith of the contest, and it should have been instituted by the persons interested in this estate. The facts in regard to this man's condition about the time that he made this will, which have been disclosed by the testimony, amply justify a very careful inquiry into his mental capacity on the date of this instrument. The witnesses on both sides have been, in my view, exceptionally honest, candid people. I do not recall the testimony of a single witness that should be discredited *in toto*. I believe that the witnesses intended to speak the truth; and such mistakes as they may have made, and no doubt did make, on both sides in regard to the matters they testified to were natural, and in no way make against their candor or the credence to be given to their testimony. The Code, which is our statute on this subject, provides, at section 2622, that it shall be the duty of the Surrogate before he admits a will to probate to inquire particularly into all the facts and circumstances, and he must be satisfied of

the genuineness of the will and the validity of its execution; and the following section (2623) provides that, if it appears to the Surrogate that the will was duly executed, and that the testator at the time he executed it was in all respects competent to make a will, and not under any restraint, it must be admitted to probate. In this proceeding the issue is presented by the second objection filed to this paper, in these words: "That neither at the time said will purports to have been executed, nor at any time when it was executed, if ever executed, was he of sound mind, memory, and understanding." All other objections which appear in the answer filed have not been regarded by the counsel for the contestant, and are not regarded by me, as the subject of comment or disposition; and the only question, as I say, is included in that objection.

I am not required by the law to state my reasons for the decision which I feel it my duty to make in this case, nor, indeed, am I required by law in any probate case, except under certain conditions, which do not obtain here, to state my reasons; but it is my conception of duty, sitting as judge and as a jury, upon a question of this sort, to state briefly, in all cases, the reasons for my conclusion, sometimes at the risk, perhaps, of reaching a right conclusion, though giving the wrong reason, but that risk I am always willing to take, because to change places with those who are interested—aside, I mean, from counsel—to change places with those who are interested in the estate, either for the will or against it, in their place I should be better satisfied to see the mind of the judge,

if I could, as he disposes of a question of such interest to me.

This case has taken a great many days to try. It has been very carefully and very ably presented on both sides. The question is one of importance in a pecuniary sense to the beneficiary named in the will, and to the kin of the decedent. I have had occasion to examine all the questions which are presented in this case heretofore very carefully. Several cases have been decided by me which have not been referred to by counsel, and in which I had at the time studied the questions with great care, and came to my conclusions, and cited authorities which seem to have sustained the views expressed; and those cases are the law of this court, because they have never been reversed, and of course they stand as the law here, unless for some reason I myself see that I have been mistaken. I said (and I again say in this case) in February, 1889, in Matter of Lissauer, 5 *N. Y. Supp.* 260; 22 *N. Y. St. Rep.* 877, (which will was rejected upon the ground of incapacity,) that the rule of decision in this state is that, if there be a reasonable doubt whether one or more of the directions of the statute have not been complied with, then probate must be refused, even if it appear probable that the paper expresses the testator's intention. That remark was more properly applied to the ceremonies of the execution of the paper; and in this case there is no dispute about the due execution of this paper,—the formalities required by the statute. The will was signed by this man, and signed at the end of the paper. It was signed in the presence of two subscribing witnesses.

In other words, all the formalities of the statute were complied with. One of the subscribing witnesses is dead, and it is certain if he was here he would speak more closely of the condition of the man at that time than perhaps any other witness who has testified, or any other person living. The other witness was a stranger to the decedent, and he testified cautiously, and testified necessarily, because he was a stranger to the testator, to the bare facts which the statute requires; and his testimony is equivalent to a negative affirmation of capacity on the part of this testator. He saw nothing that satisfied him or caused him to suspect that the man was incapacitated to execute the paper; and he at least saw that he appeared to be in robust health, and stated that the decedent thanked him for his coming in to sign the paper as a witness and departed. He saw nothing in his eyes that indicated that the man was incapable.

Ordinarily the burden of proof, which is upon the proponent always, to satisfy the court that the paper propounded was executed by a person capable at the time of making a will, is successfully carried by the testimony of the subscribing witnesses. They are the persons who have the best opportunity of judging of the condition of the testator's mind and of his surroundings; and the law has wisely (we all think) given these witnesses the right to testify to their opinion of the testator's mental capacity at that time. No other lay witness has that right for obvious reasons. The law is, as I view it, and applicable to this case, well stated in the case of Weir v. Fitzgerald, 2 *Bradf.* 42, where the court say: "Something more is necessary

to establish the validity of the will, in cases where from the infirmities of the testator, his impaired capacity, or the circumstances attending the transaction, the usual inferences cannot be drawn from the mere formal execution. Additional evidence is therefore required that the testator's mind accompanied the will; that he knew what he was executing, and was cognizant of the provisions of the will." That proposition, I suppose, will not be disputed by anybody; and it applies forcibly to the case we are now considering. The situation of this man shortly before the execution of this paper and shortly after July 13, 1888, when it was executed, as I have already said, justified a careful, and, indeed, demanded a very careful examination into his history and his walk in life, private and public, as far as it is possible to get it, during that period of time; and, considering the fact of the death of one of the subscribing witnesses and of the strangeness of the other, together with the condition of the testator, as I have described it in my judgment, it casts upon the proponent in this case, from the beginning to the end, the burden of satisfying the Surrogate beyond a reasonable doubt that the man was capable of executing a will at the time he executed this paper; that he could comprehend the nature of his property, what it was, how situated; and also appreciate and perceive the relations of those who were entitled to his bounty and to benefactions from him. The Surrogate must be satisfied of all these facts, and in this case it was the duty of the proponent to satisfy him. The question is whether or not the evidence should, as matter of law, dispose of that question in favor of sustaining

this paper or of rejecting it. Counsel for the proponent has stated very correctly that it is not the quantity (if I may use that expression) of capacity that we may inquire about. It is not necessary that the man should have the capacity to transact all kinds of business to be esteemed capable of executing a valid will; and I shall detain you for a minute by calling your attention to some authorities which were used by me in Matter of Bush, 1 *Connoly Surr. Rep.* 330, which was decided in January, 1889. Lord KENYON said, in a case which was reported in 3 Curt. Ecc. App. 2, (Greenwood v. Greenwood:) "Mind and memory competent to dispose of his property, when it is a little explained, may perhaps stand thus: Having that degree of recollection about him that would enable him to look about the property he had to dispose of, and the persons to whom he wishes to dispose of it, if he had the power of summoning up his mind so as to know what his property was, and who those persons were that then were the objects of his bounty, then he was competent to make a will." I think our statute says that every male person of the age of 18 years or upwards, and every female of the age of 15 years or upwards, of sound mind and memory, and no others, may give or bequeath his or her personal estate by will in writing. Well, the question is, what does our statute mean by a man of sound mind and memory? It has been decided, and it is the law, I think, that such a man is aptly described as *compos mentis*, and that a man without sound mind and memory would be aptly described as *non compos mentis;* and since the law existed, it has been held that a *non compos mentis*

was an imbecile, a lunatic, or an idiot, and not a person of merely impaired mental faculties. A man whose mental faculties are weakened or impaired, even to a considerable degree, is not *non compos mentis* within the legal definition of that term, applied to the act we are now considering, viz., the making of a will. That is the law as laid down in the leading case of Delafield v. Parish, 25 *N. Y.* 9, and in the old case of Jackson v. King, 4 *Cow.* 207, where it was held that the law recognizes no incompetency but that of idiots, lunatics, and persons *non compos mentis;* giving the description there cited from Coke Littleton of "incompetency," (and which is applicable to the case that we are now considering,) as not a partial, but an entire, loss of understanding. I could continue, of course, to multiply precedent decisions to sustain this proposition that was stated in argument by Mr. Spink, and not denied, of course, by Judge BROWNE,—that we must find in this case that this man was without capacity, that he was *non compos mentis*, and that he had no understanding; and of this you must satisfy the Surrogate beyond a reasonable doubt; otherwise this paper propounded must be admitted to probate. And so we come down to the testimony.

I have already said that I have entire confidence in the good faith and honesty of all of these witnesses. Never, in my experience, have I known 25 or 30 witnesses to testify against each other where, to my mind, although the conflict was rather sharp in some respects, I felt that they were all endeavoring to tell the truth. The will itself is an item of evidence. It has been referred to briefly by counsel. It is always to

be considered, and it is always an important item of evidence. Considering the man's surroundings and his relations to the world, and his relations to his family and kindred, is the paper propounded in a given case a natural will? Does it seem to be consistent with what would be the natural feeling and sentiments of a testator? Well, in this case, I think this is a very natural will, and a very just will. The man had an undoubted right, so far as the moral ground of the question is concerned, to contract a marriage. He had the legal right to contract that marriage if he were a sane man. That he was regarded by his family, friends, and his neighbors, who have been called here as witnesses, as a proper subject of matrimony, must be admitted by all; for all these people—his relatives, and those who have testified against his capacity at that time —were present at the wedding, and enjoyed the festivities, and congratulated him upon the act. That is, I think, a justifiable comment upon their testimony in this case against his capacity, not to impeach them or to discredit them, but to explain what has been called in the case the reason for a little exaggeration or romancing, a florid sort of statement that came from the witnesses on this trial, which is not consistent with their conduct at the time of this wedding. And another item of evidence which was not commented upon by either side is, I think, significant of the state of mind of the persons who were most intimately associated with this man at the time of his marriage, or about the time that we are considering, namely, the sale by him to his brother-in-law of his property. Surely neither Mr. Volm nor Mrs. Volm had any idea

that the man was insane, and incapable of making a valid transfer of this property at that time; and that was the time when they were best able to judge of his condition. If they had, they certainly would not have dealt with him, because I do not believe, from the testimony, that either Mr. Volm or Mrs. Volm are capable of overreaching or defrauding anybody, or attempting to do it; and, if the man was insane at that time, and incapable of making a will, then the sale by him to Mr. Volm, his brother-in-law, was a fraud in law on the part of the latter. The number of witnesses on each side of this controversy who observed this man during the period covered by the injury seems to have been about the same. The interest of the witnesses in the result of the controversy may be about the same. I do not believe that a single witness has had any interest in this controversy, except to see it properly and righteously decided. A number of the witnesses were called by the contestants, and (without going over their testimony one by one, which would be an unwise and unnecessary thing for me to do,) they called many lay witnesses, and some expert witnesses, whose testimony, taking it as an entirety, impugns this man's capacity, and represents him as incapable of executing a will valid in its character, or of executing a valid contract of any kind, or entering into any business transaction, or performing any business act, from about the time he was sent to Bloomingdale until the time he was released. The dates I do not mention, because I do not recall them. Some of the testimony from contestants establishes the fact that, to their view, the man was incapable

and insane down to the very time of his marriage,—the very day; but the wedding, and the evidence upon that point, is largely against their belief; and that is all their testimony amounts to, as what they believe on that subject. There is no doubt in my mind at all from this testimony, too, that the man was *compos mentis* at the time he was married; and that he not only was *compos mentis* at the time, but that all of his friends, and the witnesses, the relatives, including these people, these contestants, believed him to be *compos mentis* at that time.

Counsel for the contestants have referred to the value of expert testimony. I think I ought, in justice to him, to state that the law, as I remember it as it has been laid down in our state, and I have cited it, is not as he supposes. I know that our Court of Appeals, in a case which I supposed I had under my eye, condemns the testimony of medical witnesses where it is produced against the testimony of witnesses—lay witnesses—who have actual view of the person whose capacity or sanity is the subject of controversy. The court said in that case: "The medical discussions of men learned and eminent in that profession are no doubt interesting as matters of general information, and often as the argument of eminent medical counsel, and are illustrations of the zeal and positiveness with which doctors disagree upon subjects upon which human knowledge is imperfect, and which will continue to be shrouded in mystery until we see face to face, and know even as we are known." That is the language of the opinion; and I think Judge Browne will agree with me that the testimony of experts, al-

though admissible always, and a great aid to a court and jury in discovering where the truth lies, in a question of this kind, cannot ever be held to be conclusive and controlling against the testimony of those persons of intelligence who saw the man daily and who had transactions with him of a social character and in business. Dr. Brill, whose testimony was very strongly relied upon in argument, examined this man in November, 1886, and knew nothing about him two years thereafter, when he made this will. His testimony may be absolutely true, and, for the purposes of this case, it is safe and proper to admit, if you please, that it is true.

The evidence in this case satisfies me, and I think it must satisfy everybody, that this man might have and did have a lucid interval at that time; and that a will may be made in a lucid interval, of course, is established over and over again. It is not necessary to quote any authority for that. The fact that this man had been committed to a lunatic asylum may be presumptive evidence of his insanity, although that is controverted by Mr. Spink, (and I am inclined to think that he is right about it,) but for the sake of the case we will admit that. I have a case here, Matter of Pendleton, 1 *Connoly Surr. Rep.* 480, where the will of a person (who, at the time the will was made, was under the care and custody of a commission in lunacy) was admitted to probate. That, however, proves nothing. That case is no authority to us, except that the existence of the commission in lunacy was not regarded as conclusive at all upon the question of capacity. As to that, the court inquired independently,

and came to the conclusion that the lunacy commission was wrong, and that the woman was sane, or that she had a lucid interval. The number of witnesses called by the contestants to sustain their case, by count—if we were to count them, and to thus talk about the weight of evidence—falls some five or six short of the number called by the proponent upon the very same question. There was one witness in this case whose testimony was, to my mind, a gem. Every word that fell from that woman's lips I believe was golden truth; and, if her testimony is true of the details of the conversation that she had with this man,—if what she said was true, as I believe it to have been beyond the possibility of a doubt,—then this man, Kiedaisch, the testator, was competent to execute a will; and quite aside from the testimony of anybody else, taking that witness' testimony—the young woman, Mrs. Beiser—taking her testimony as true, (and I, as I have said, believe it to be,) there could be no question in the mind of anybody but that this man was capable of making a will at the time he made this one; and I have come to the conclusion, as you see, that on all the evidence I am satisfied beyond any doubt that this decedent had capacity to make this will, and that it is entitled to probate. And I think that the testimony should satisfy the friends and relatives of this man, who have so fairly and properly sought this contest and this inquiry. Let a decree be presented admitting the paper to probate.

CATTARAUGUS COUNTY.—HON. ALFRED SPRING, SURROGATE.—December, 1890.

MATTER OF INGERSOLL.

In the matter of the estate of ALMIRA INGERSOLL, *deceased.*

The will of testatrix contained the following clause:

"I am desirous of leaving some of my estate to aid in carrying on the work of the Christian ministry, and to uphold the doctrine and faith of the Bible, and aid in extending the Christian religion. . . . . I do hereby authorize and empower my executor . . . . . to expend through the agency of the Baptist Church, and its various societies, missionary and educational, or in such other way through the said church or its organizations as shall be deemed best likely to promote these purposes, such sum as he may deem best, but not to exceed $1,000, and, in order that my executor may be enabled to do so without hindrance, I give and bequeath to him the said sum of $1,000. and the sum is to him and his heirs and assigns for the uses and purposes before stated, and I rely on him to carry out the wishes and purposes that I have hereinbefore indicated." *Held*, that this provision was not an absolute bequest, but was a trust which was void for uncertainty as to the beneficiary.

PROCEEDING for the construction of the eighth clause of the will of Almira Ingersoll, deceased.

The clause of which the construction was sought in this proceeding appears in the opinion of the Surrogate.

W. S. THRASHER, *for executor.*

F. J. BLACKMAN, *for legatees.*

THE SURROGATE.—The construction of the eighth clause of the will of testatrix is put in issue in pursu-

ance of section 2624 of the Code of Civil Procedure. The clause reads as follows: "I am desirous of leaving some of my estate to aid in carrying on the work of the Christian ministry, and to uphold the doctrine and faith of the Bible, and to aid in extending the Christian religion in the world through the instrumentality of the preaching of the gospel of Christ; and, desirous of promoting these purposes, I do hereby authorize and empower my executor hereinafter named to expend through the agency of the Baptist Church, and its various societies, missionary and educational, or in such other way through the said church or its organizations as shall be deemed best likely to promote these purposes, such sum as he may deem best, not to exceed $1,000, and, in order that my executor may be enabled to do so without hindrance, I give and bequeath to him said sum of $1,000, and the sum is to him and his heirs and assigns for the uses and purposes before stated, and I rely upon him to carry out the wishes and purposes that I have hereinbefore indicated, and that those interested in my estate will co-operate in carrying on the work that I, by this bequest, desire to promote." When simmered down, this clause means that the testatrix bequeaths to the executor $1,000 for the promotion of the Christian religion through the agency of the Baptist Church, and its various societies, missionary, educational, or others that may be designed to carry out the object stated. The clause is void for uncertainty. It is impossible to determine who is the legatee. No beneficiary, no definite corporation, can enforce its payment, and this is one of the essentials to render a

bequest valid. Levy v. Levy, 33 *N. Y.* 97–107. The testatrix seeks (1) "to aid in carrying on the Christian ministry;" (2) "to uphold the doctrines and faith of the Bible;" and (3) "to aid in extending the Christian religion." And for the purpose of rendering effectual this bequest she authorizes her executor to expend, "through the agency of the Baptist Church," and its various organizations, not to exceed $1,000. The purposes for which this money is to be expended are not precisely stated. Testatrix evidently had in mind the advancement of the religion of Christ; but any society within the pale of the Baptist Church, wherever located, or whatever its special work may be, could claim to be the recipient of the bounty of the decedent. It is not the Baptist Church of Leon, where testatrix resided, not the organizations of that society in Cattaraugus county, not of New York state, not any particular branch of the church, but its various societies, etc.; if the bequest had been to all those believing in the rite of baptism as a saving ordinance it would have been as easy to ascertain the precise beneficiary as in this will. In neither case could any one receive the legacy. In Prichard v. Thompson, 95 *N. Y.* 76, the will directed the distribution of the fund among such incorporated societies in the states of New York and Maryland as were authorized to receive and hold funds for charitable and educational uses as the executor might select. The court, in holding the bequest void, say, at page 81: "The beneficiaries referred to, consisting of every corporation within two states of the character named in the will, would be almost innumerable, and none

of them could claim that any specific portion of the bequest belonged to them. . . . . It is a well-settled and established rule that, where a gift to a charitable use is so indefinite as to be incapable of being executed by a judicial decree, the representative of the donor must prevail over the charity. Williams v. Williams, 8 *N. Y.* 526.

Within the rule stated it is quite obvious that insuperable obstacles exist which prevent a distribution of the fund intended to be created by the testator's will, and that by reason of a want of precision and certainty in the bequest made, and the difficulty in the selection of those who would be entitled to be benefited thereby, it cannot be carried into effect. No case in this state goes so far as to hold that such a bequest is valid and effectual and capable of being executed within the well-established rules of law which are applicable to the doctrine of charitable uses and trusts. See, also, Holland v. Alcock, 108 *N. Y.* 312, Matter of Will of O'Hara, 95 *N. Y.* 403. These cases plainly limit Power v. Cassidy, 79 *N. Y.* 602, upon which counsel for the executor relies, and they are decisive of this case.

The counsel for the executor urges that no trust is created by this clause of the will, but the bequest is directly to the executor, and the direction for the expenditure of the money is surplusage, leaving it optional with him to retain personally or use the funds for the purposes stated. I cannot spell that construction from this clause. While the bequest purports in one phrase to be to the executor, "his heirs and assigns," it is especially limited to the objects above set

forth. It is not an absolute gift to the executor; but the whole scope of the clause is that the testatrix had in view the promotion of Christianity, and never contemplated that the executor was her beneficiary, or that he was to determine whether or not the money was to be expended. Eliminate from this clause of the will everything implying a bequest for a charitable purpose, and it will be stripped of every significant direction or suggestion contained in it. The cases cited by counsel upon this branch of the controversy I do not regard as applicable. They hinge upon a bequest to a person by name coupled with precatory words indicating a wish of decedent that her property be expended by the donee in a way designated. The courts hold the legacy is absolute, that no trust is created, and her suggestions as to the expenditure of her moneys do not limit the positive character of the gift or impose any legal or enforceable obligation upon the beneficiary. The entire tenor of this will, so far as this clause is concerned, is that the executor in that capacity is the repository of this fund; that she is not in any sense referring to the individual, but to the trustee, and the legacy is not to Senator Allen, but the discretion in explicit terms is invested in the executor, showing unmistakably he was simply the medium chosen by her to make effective this last testimonial to her religion. A decree will be entered in accordance herewith nullifying this clause for uncertainty, and providing for the probate of the will with this exception. The costs will be adjusted and inserted in the decree.

ROCKLAND COUNTY.—HON. GEORGE W. WEIANT, SURROGATE.—December, 1890.

MATTER OF BLAUVELT.

In the matter of the judicial settlement of the account of CATHARINE BLAUVELT, *and* JULIA MANSFIELD, *as executrices of the will of* ISAAC F. BLAUVELT, *deceased.*

The will of testator gave to his wife "during her widowhood, the use of all my real and personal estate, authorizing her to sell and dispose of any of my real estate, as to her shall seem just, giving and executing all deeds and writings necessary to secure the purchasers in all rights of ownership in the same manner as I could have done if living." The will further directed that upon the death of the wife the estate should be divided between the two daughters of testator, and that for such purpose, the executors were directed to then hold the estate in trust for them, paying to each daughter during her life the income of one half of said estate, and at the death of each daughter it was provided that her one half share was to be divided among her heirs as they should attain the age of twenty-one years. *Held*, that the widow took simply a life-interest which entitled her to the use or income of the estate during life or widowhood, with the power of sale of the real estate; that upon her death or the determination of her widowhood, the estate both real and personal, passed as directed in the will, without any other diminution or impairment than that resulting from unavoidable loss or depreciation, which in the exercise of ordinary care, prudence and judgment, the widow in the enjoyment of her estate, could not prevent.

Except under special circumstances, the investment by an executor of the funds of the estate in personal security, is a breach of trust, and for any loss arising therefrom, the executor is liable.

Where executrices who held a first mortgage belonging to the estate allow it to be paid and then re-invest the proceeds in a second mortgage on the same property, the two mortgages aggregating the full value of the property, this is a breach of trust which will render them chargeable with any loss arising therefrom.

While the circumstance of an investment on second mortgage by an exec-

utor is one of importance upon the question of the exercise of proper care, yet it only calls for the exercise of greater caution in making the investment, for there is no rule of law prohibiting the investment of trust funds in any other than first mortgages.

Where a loan by an executor upon mortgage is a safe one when made, such executor will not be held liable for a loss arising from the sudden depreciation of the mortgaged property by reason of a general financial panic.

ACCOUNTING of the executrices of the will of Isaac F. Blauvelt, deceased.

The facts appear in the opinion of the Surrogate.

A. & A. F. FALLON, *for executors.*

AARON A. DEMAREST, *for contestants.*

THE SURROGATE.—The testator by his will bequeathed and devised his estate as follows, after payment of his debts:

"I give unto my wife Catharine during her widowhood the use of all my real and personal estate, authorizing her to sell and dispose of any of my real estate as to her shall seem just, giving and executing all deeds and writings necessary to secure the purchasers in all right of ownership, in the same manner as I could have done if living. After the death of my wife Catharine, I order that my property be equally divided between my children, Catharine Elizabeth and Julia Frances, that is to say: I give to my executors in trust for and during the natural life of my daughter Catharine Elizabeth for her sole use and benefit the income and profits of the one equal one half of all my real and personal estate, and after her death I order the said half of my estate to be equally divided among her heirs as they shall attain the age

of twenty-one years each, if any shall be minors at her death. I also give to my executors in trust for and during the natural life of my daughter Julia Frances, for her sole benefit and use, the income and profits of the other one half of all my real and personal estate, and after her death I order the said half of my estate to be equally divided among her heirs as they shall attain the age of twenty-one years each if any shall be minors at the time of her death."

"I further direct my executors to pay the said income and profits to my daughters Catharine Elizabeth and Julia Frances in half yearly payments, the said Catharine Elizabeth and Julia Frances giving their receipts for the same. If either of my children Catharine Elizabeth or Julia Frances should die before their heirs shall have attained the age of twenty-one years, I order that said heirs receive their proportion of the income to which their mother was entitled while living in half yearly payments."

The testator's widow and his daughter Julia Frances are the acting and accounting executrices.

The widow under the power of sale given her in the will has sold and conveyed certain of the real estate of the testator, and the contestants claim that the executrices must account for the proceeds of such sales as a part of the residuary estate bequeathed and devised to the two daughters of the testator and to their respective heirs.

The widow contends that by virtue of 2 *R. S.* 732, (8th ed., p. 2446,) § 81, upon the execution of such power of sale, she became the absolute owner of the proceeds.

That section provides that "where an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate for life or years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon in case the power shall not be executed or the lands shall not be sold for the satisfaction of debts."

I do not understand the power of sale conferred upon the widow under this will to be an absolute one, such as is contemplated by this statute. Terry v. Wiggins, 47 *N. Y.* 512–516.

"Every power of disposition shall be deemed absolute by means of which the grantee is enabled in his lifetime to dispose of the entire fee for his own benefit." 2 *R. S.* 733, (18th ed., p. 2447,) § 85. The will when considered in all its parts, does not indicate that the power was conferred to dispose of the entire fee for the widow's own benefit. It must rather be construed as for the benefit of all, to realize a greater income, to facilitate distribution, to save partition. Mutual Life Ins. Co. v. Shipman, 108 *N. Y.* 19. To sell or dispose of the real estate as to her shall "seem just" must mean just, to all interested in such estate. It is very clear from the whole instrument that the testator did not intend to confer such an absolute power of sale as would destroy the devises over of his estate. The provisions disposing of his property after the death of the widow are specifically set forth and he thereby bequeaths and devises "all my real and personal estate." If the widow is given by virtue of the power an absolute title to the real estate, then the

testator had no real estate to devise after his widow's death.

To warrant such a construction of this devise to the widow as would nullify express subsequent provisions of his will, specific terms having that effect must appear in the instrument. The testator in exact words limited the estate of his wife to the use of all his real and personal estate during her widowhood, and to enlarge this into a fee as to the realty it must appear in clear terms where such enlargement would have the effect of nullifying devises of such realty after the death of the widow.

Of course, in the consideration of the question of the effect of this power of sale conferred upon the widow, the distinction must be kept in mind as to whether the question is raised by a purchaser as to his title acquired by virtue of a sale under this power, as here, where it is raised by one claiming under the will an estate or interest in the proceeds.

It is doubtful whether the testator intended conferring other than such power as a life-tenant may exercise. Even the words "disposal absolutely" may have their absolute character qualified by restraining words connected with and limiting them to mean such absolute disposal as a tenant for life may make. Smith v. Bell, 6 *Peters*, 68. To the same effect Brant v. Virginia Coal Co., 93 *U. S.* 326; Bradley v. Westcott, 13 *Ves.* 445.

But even if the power of sale intended to be given to the widow was to sell the realty with the full title of the testator, if she saw proper to exercise the same to enable her to realize a larger income therefrom for

herself, yet it did not confer upon her an absolute title to the proceeds of the sale so as to cut off the other devisees from all interest therein. A sale under this power would not have the effect of destroying the devise to the testator's daughters and their respective heirs, as the testator had not such an intention. At most it would cut off their interests in the particular real property sold. In other words the purchaser from the widow might acquire a title in fee, relieved from the claim or estate of such devisees in the realty conveyed, but the proceeds would yet remain as real estate or become personalty, and to be thereafter still held by her subject to the use and disposition of the real estate according to the provisions of the will. Leonard v. American Baptist Home Missionary Society, 35 *Hun* 292–295.

Where a testator by his will gave all his real and personal estate to his wife "for her life, she to have the same power of sale and control over said property as I could have in my own proper person," and in the following provision of his will gave to his children in equal shares "all the rest, residue and remainder of my real or personal property in fee absolutely and forever, which shall remain after the life estate," in the preceding provision of his will given his wife, it was held by Surrogate ROLLINS in Fernbacher v. Fernbacher, 4 *Dem.* 227; 17 *Abb. N. C.* 339, that the grant to the wife of the same power of sale and control of said property as the testator himself possessed, did not in view of the other provisions of the will, enlarge to a title absolute the interest, or estate expressly given to the wife for life, and the limitation over to

the children was valid. This is a well considered case and the judgment of the learned Surrogate is predicated upon an elaborate review of the authorities. I consider the determination of the court well founded in that case, and as there is certainly nothing in the provisions of the will of the testator in this case more favorable to the widow, I must reach a like conclusion as that of the learned Surrogate there. Indeed, in that case all the real and personal estate was given to the widow for her life. In this the "use" for life was bequeathed and devised. The case of Campbell v. Beaumont, 91 *N. Y.* 464, is not in conflict with the construction I have adopted. There the testator left to his widow all his property to be enjoyed by her for her sole use and benefit. There were no limitations upon the estate given her.

Furthermore: "No expectant estate can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent estate," 2 *R. S.* 725, (8th ed., 2434,) § 32, unless in some manner or by act or means which the party creating such estate shall in the creation thereof have provided for or authorized." *Id.*, § 33.

I am unable to perceive how the power of sale bestowed upon the widow in this instance can be so construed as to confer upon her a power that will defeat or bar the estates given to the daughters and their respective heirs. There is nothing in the terms of the will to so indicate, while the instrument as a whole clearly shows a contrary intention. Such a construction would wipe out express and thoughtfully prepared provisions of the will, and it should not be

adopted unless the provisions are clearly antagonistic and cannot stand together unless such provisions contravene some absolute rule of law. Campbell v. Beaumont, *supra*. When provisions are irreconcilably conflicting, one must give way to the other, and that next be adopted which seems to accord most nearly with the testator's primary intention or object in executing the instrument, but when by limiting the character of the first estate, the second may also be preserved, it is clearly the duty of the court to do so. Wager v. Wager, 96 *N. Y.* 164–174.

Nor is there anything in the will that gives the widow more than the "use" of the estate during her widowhood. That is the estate given her by express words, and there is no provision giving her more. No terms or language are found in the instrument that can, except by the most radical distortion, be construed so as to authorize a complete or partial absorption of the principal estate. The instrument as a whole negatives such a construction and without the interpolation of words and the nullification of parts of the will no such contention can prevail.

Surrogate ROLLINS so held in the case of Matter of Fernbacher, *supra*, and there the word "use" or words of like import did not appear as in this.

My conclusion therefore is that the widow takes simply a life interest, which entitles her to the use or income during that period, with power of sale of the real estate, it may be absolutely, and of changing the character of the property. That upon her death or the determination of her widowhood the estate real and personal of the testator passes to the daughters

and their respective heirs as provided in the will, whether said property shall then remain in its original form or shall have been changed to another, and without impairment or diminution, unless by unavoidable loss or injury which, in the exercise of fair judgment and ordinary care and prudence, the widow in the enjoyment of her estate could not prevent.

The cases cited to sustain the construction that the widow might exhaust or appropriate the body of the estate in her use of the same are instances where words were used by the testator indicating that he contemplated the exhaustion of or appropriation by the life-tenant of the body of the estate. Such as, in Thomas v. Woolford, 49 *Hun* 145; 21 *Abb. N. C.* 231, where we find used the words "should there be any left to be divided among the children or their heirs;" in Flanagan v. Flanagan, *Abb. N. C.* 413, "the portion left of said remainder;" Simpson v. French, 6 *Dem.* 108, "to do with said property as he shall think best," and "left by her,;" in Matter of Williamson, 1 *Connoly Surr. Rep.* 139.

The executrices must therefore account for all of the principal estate of the testator that has come into their custody as such, and hold the same in accordance with the provisions of the will as above construed.

Applying this construction of the will to certain acts of the executrices in the administration of the estate, it is claimed by the contestants that certain losses of the principal estate have been sustained which the executrices cannot be credited for as sought in the accounts.

My present understanding is that the contestants

only insist upon the disallowance of five of these credited losses. Two notes made by M. Delos Mansfield for $600 and $1,800 respectively; a bond and mortgage on lots 3 and 4 of the Washington avenue property made by said Mansfield to the widow Catharine Blauvelt to secure $2,000, dated February 19, 1874, a bond and mortgage made by said Mansfield to Mrs. Blauvelt on lot 6 of the Washington avenue property to secure $2,000, dated Nov. , 1873, and a bond and mortgage from said Mansfield to Mrs. Blauvelt on the Hillside avenue property to secure $2,000, given in 1874. It seems to be conceded from the evidence that the moneys invested upon these securities were part of the principal estate; that the debtor eventually became insolvent and that the said amounts were entirely lost.

These were trust funds, and the widow and executrices were bound to invest the same in securities regarded in law as proper investments, and to "employ such diligence and such prudence in the care and management of them as in general prudent men of discretion and intelligence in such matters employ in their own like affairs." King v. Talbot, 40 *N. Y.* 76–85.

"This necessarily excludes all speculation, all investments for an uncertain and doubtful rise in the market and of course everything that does not take into view the nature and object of the trust, and the consequences of a mistake in the election of the investment to be made." Id. "The preservation of the fund and the procurement of a just income therefrom,

are primary objects of the creation of the trust itself and are to be primarily regarded. Id.

Within those rules which have been recognized repeatedly by the courts as equitable and just, the investments on the notes were improper.

"Except under special circumstances an executor has no right to risk upon mere personal security, funds that his testator has entrusted to his management, and an investment upon such security constitutes a breach of trust for which the executor is personally chargeable." Matter of Cant, 5 *Dem.* 269, and cases cited. Matter of Keteltas, 1 *Connoly Surr. Rep.* 468.

No circumstances appear in the case making it an exception to this rule, and the credits for the losses on the notes must be refused.

As to the mortgages I see no escape for the executrices for the losses in two of such investments. These executrices are people of honesty and integrity, and there is evidence of good faith in the fact that at the time of making the investments they believed that the funds were the absolute property of the executrix Mrs. Blauvelt, as widow, but upon the proof I am forced to the conclusion that the two losses have resulted from imprudent selection of securities or mismanagement. "Good faith and honest intentions will not protect men in the performance of a trust when they depart from prudential rules which the experience of others in similar transactions has approved as the only safe guides." Bogart v. Van Velsor, 4 *Edw. Ch.* 719.

The mortgage on the Hillside avenue property was originally $3,500, and a first lien; this was paid in

part and canceled to permit Mr. Mansfield, the mortgagor, to obtain a loan of $4,000, to be secured by a mortgage upon the same lands, after which the $2,000 mortgage in question was taken by the executrices as a second lien. This may have been a great favor for Mr. Mansfield, but it was the surrender of a perfectly good security for one that was even then reaching the full value of the property and eventually proved worthless. The evidence shows the value of the property to have then been only about $6,000. There is no good reason why this change should have been made in the proper management of the estate. It was this act that caused the loss. It was a most imprudent thing to do and there is evidence that indicates that these ladies, losing sight of their duty to the estate, through kindness of heart, sought to favor one who stood somewhat near them through his marriage, and unfortunately they must now pay penalty for granting this favor.

As to the two mortgages on the Washington avenue property, I think that the executrices should be held for one and credited with the other. The one on lots 3 and 4 may perhaps be considered not an imprudent one under all the circumstances then existing. Prices of land in that locality were very high and yet careful men seemed to purchase at such prices and believed the values substantial. The evidence shows the two lots to have been worth from $6,000 to $8,000, at the values then prevailing. The mortgages aggregated $5,000. While it is true that the circumstance of an investment on a second mortgage is one of importance on the question of the exercise

of a proper degree of care, yet it only calls for greater caution in making the investment. I do not understand that there is any rule of law prohibiting the investment of trust funds on other than first mortgages. The question always is one of proper care and prudence.

In Smith v. Smith, 4 *Johns. Ch.* 281, Chancellor Kent, says at page 284, "I have no doubt that it is a wise and excellent general rule that a trustee loaning money must require adequate real security or resort to the public funds. If he invest the trust moneys in the public funds he is not liable for the fall of the stocks, and probably the depreciation of the real security would come within the reason of that rule."

As to these lots there seems to have been at the time of investment a margin of from $1,000 to $2,000. A general financial panic throughout the country followed or occurred about the same time, and a rapid depreciation of values followed. Under such circumstances I do not think the law holds a trustee liable for losses occurring from such depreciation. Denton v. Sandford, 103 *N. Y.* 607.

I shall therefore relieve the executrices from the loss on this mortgage, but for the one on lot 6 they must be held responsible. This lot was not worth at the prices even then prevailing above $3,000 or $3,500. That being so, the two mortgages, $1,400 and $2,000, aggregated the full value of the lot. This was not only lack of prudence but folly, to make a loan on a second mortgage under the circumstances.

Let a decree be presented for signature and entry, adjusting and settling the accounts accordingly.

Costs to both parties payable out of the estate to be taxed and inserted in the decree.

NOTE. The decree of the Surrogate was affirmed by the General Term of the Supreme Court in the second department, July 2, 1891.

After stating briefly the facts, the General Term said: "The meaning and intent of the will is that the widow may sell the lands for the purposes of the will. She is to have the entire use of the proceeds, but the same must go to the daughters and their children, as provided for in the will. The construction claimed by the widow is inconsistent with the scope and intent of the will, and a gift of a life-estate with power of sale and remainder over after the life-estate of all the testator's property is entirely consistent with the power of sale. Monarque v. Monarque, 80 *N.* Y. 320. The proceeds of the land became personal estate when the land was sold and actually converted into money under this power, and the Surrogate had jurisdiction to compel an account therefor. The appellants make no point as to the propriety of the decree holding the executors liable for imprudent loans. The decree seems faultless in this respect. King v. Talbot, 40 *N.* Y. 76."

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—January, 1891.

MATTER OF HAMILTON.

In the matter of the application for the probate of the will of ROBERT RAY HAMILTON, *deceased.*

Upon the application for the probate of the will of testator it became necessary to determine as a preliminary question whether or not one E. S., an alleged widow of testator, had been in fact his lawful wife, and as such had the right to appear and contest the probate of his will. The alleged widow had gone through a marriage ceremony with testator, but it was alleged that at the time of this marriage she had been already married to a person one J. M., who was still living at the time of her marriage to testator, and from whom she had not been divorced. The facts as to the first marriage were as follows: The alleged widow

MATTER OF HAMILTON.

E. S., and J. M. had cohabited together for years, but there has been no ceremonial marriage. At the time when J. M. had become a total imbecile, E. S. told a witness that she was tied to him by her sense of obligation to him as his wife, because prior to that time she had been married to him and he had been a good husband, and that she had been advised by some of her friends in consequence of his condition, his habits, his drunkenness and his utter worthlessness to get a divorce from him. J. M. in her presence testified on a trial that he had met her several years before at Philadelphia and had married her, and that she was his wife. And it also appeared that her brother had written her name and that of J. M. upon a hotel register as man and wife. Upon the application for the probate of the will of testator, E. S. testified that she had never been married to J. M., and she first testified that she had not and then testified that she had been his mistress. *Held*, that this evidence showed a marriage between E. S. and J. M., and said marriage never having been dissolved the subsequent marriage of E. S. to testator in the lifetime of J. M. was a nullity, which gave her upon his death no standing in court to contest his will.

The decision of the Surrogate upon a question of fact arising upon proceedings for the probate of a will, is equivalent in its effect to the verdict of a jury.

APPLICATION for the probate of the will of Robert Ray Hamilton.

Upon the application for the probate of the will of this testator, it became necessary to determine whether or not Eva L. Steele, a woman who appeared upon that proceeding and claimed the right to contest the probate of the will, was in fact the widow of deceased.

Upon this question voluminous evidence was taken and the Surrogate decided the matter by an oral opinion delivered at the close of the testimony and arguments of counsel on this question.

ELIHU ROOT, *for proponent.*

CHAS. W. FULLER, *for contestant.*

THE SURROGATE, (*orally.*)—The law applicable to this proceeding is well settled in this state, and it is

only necessary to apply it to the facts which have been adduced in evidence. The trial has been one of great interest to the parties to the proceeding, and its result to them is a matter of deep concern. Whether the contestant was or not, at the time of the ceremony of marriage between her and Robert Ray Hamilton, a woman worthy to be the wife of an honorable man, is not a question for me to decide, and I do not pass upon it. But in his opinion she was. Acting upon facts which had come to his knowledge, she was worthy, and he was satisfied to make her his wife. He at the time believed that she had the right, in law, to assume the marital relation. Whether such belief was induced by fraud, perpetrated by the contestant and by others assisting her, is not a question for me to decide, and I therefore express no opinion. In this proceeding, which is brought to inquire into all the facts and circumstances attending the execution of the paper propounded as the last will and testament of Robert Ray Hamilton, we are obliged to consider as a preliminary question the right of the claimant to appear and be heard in the proceeding as his widow, and as such entitled to a share in his estate, and to contest the validity of the paper propounded. Counsel on both sides have well stated the question, which is one of fact, to be determined before we make any inquiry in regard to the *factum* of the paper offered for probate. The Surrogate in this prceeding, from the beginning to the end, not only in regard to the nature of the proceeding and this preliminary inquiry, but in respect to the *factum* of the paper propounded, sits as a jury. It is his duty to pass upon the evi-

dence, and, having ascertained the facts, his finding thereon, upon a conflict of evidence, is, in my judgment, equivalent to the finding of a jury, and must settle forever in all courts the question of fact involved. If he errs in his application of the law, the appellate courts will correct his mistake, but they are powerless, as they should be in the proper administration of human affairs, to inquire into the facts which he, as a jury, has determined, as I think, for all time.

I approach the disposition of this preliminary question with much deliberation, and with a full appreciation of the responsibility which rests upon me to do, as nearly as human mind and heart can do, justice between the contestant, who is here asserting her claim as the lawful widow of Robert Ray Hamilton, and the family of that man, who are here denying that she was ever his wife, and that she has any *status* to appear in this present proceeding.

I have given very careful attention to the testimony given by every witness, and I have listened to and have been aided by the arguments of counsel on both sides, upon the facts and upon the law. Suggestions have been made by them which probably would have escaped my attention but for their presentation, but the law which must be administered in this case is that which is well understood by us all, and in respect to which there is no disagreement between counsel. If this case had been tried before a jury, certain defined issues would have been framed and passed upon by the court, and then presented in writing to the jury for them to say "Yes" or "No," and upon their answer would depend the determination of the ques-

tion of fact involved. Here no such formal issues have been framed, nor are they needed. They are presented by the pleadings, namely, the answer to the petition for probate, filed by this contestant, (who asserts her right to contest as the widow, and that question depends, of course, upon her lawful marriage with Hamilton,) and the reply thereto, served upon her and filed in court by a legatee as a party to the proceeding. - The issue here presented is whether the contestant is the widow of Hamilton. There was a ceremony of marriage between them, the legality of which could not have been questioned if at that time she and Hamilton were capable, in law, of contracting a marriage. But, if she was incapable in law of making such a contract, then the ceremony had no significance, and the alleged marriage was a nullity, and must be so declared. Whether that ceremony was or was not brought about by fraud is immaterial here. The only question for me to consider is, had she the right to make a matrimonial contract with Hamilton? Contestant's counsel has conducted the case from the beginning, not only with great ability and fidelity to the interests of his client, but with candor, and whatever an honorable, industrious and skilful advocate could find to aid his client, he has presented in a most attractive manner. He has proceeded in his argument necessarily upon the premise that the relation between Joshua J. Mann and Eva L. Steele, his client, was in its origin meretricious, and that there is no evidence that that relation ever became marital. If that premise is sustained by the facts in the case, judgment must be for her, for in this proceeding it is no concern of ours

whether her relations were, as she described them yesterday, meretricious, improper, those of a mistress, or whether they were what she first said, or, as I believe, meant to say, that they were not improper and not marital, but were rather those of a devoted female friend to a man who was in the last stages of imbecility.

I make no comment upon the testimony given by many of the witnesses of her, and Mann's declarations upon the subject of their marriage. It will not be argued that those declarations were not inadmissible. They do not of themselves establish a marriage, but they do disclose one of two things: either an honest emotion and sentiment of their hearts at the time they were made, or they disclose a determination on their part to make these declarations for the purpose of protecting themselves against the obloquy in the community by concealing their real relations to each other. For the sake of certainty I shall read briefly from a very late decision from our Court of Appeals the general proposition on this subject, a case which has not been referred to by counsel, but which, no doubt, is familiar to them. The case of Gall v. Gall, 114 N. Y. 109, is the case to which I allude. It is proper to say that this case was decided by a majority vote of the members of the court. We have not the benefit of the dissenting opinion, if any was written, but the proposition which I propose to read will be found fully supported by every case in this state upon this subject. The reason for the dissent was probably the belief of the minority of the court that the facts in the case did not warrant the application of the princi-

ple of law set forth. The court say: "The cohabitation, apparent, decent and orderly, of two persons opposite in sex, raises a presumption of more or less strength that they have been duly married. While such cohabitation does not constitute marriage, it tends to prove that a marriage contract has been entered into by the parties. Where, however, the cohabitation is illicit in its origin, the presumption is that it was continuous until a change in its character is shown by acts and circumstances strongly indicating that the connection has become matrimonial. It is sufficient if the acts and declarations of the parties, their reputation as married people, and the circumstances surrounding them in their daily lives, naturally lead to the conclusion that, although they began to live together as man and mistress, they finally agreed to live together as husband and wife."

What do the facts in this proceeding establish? Assume, for the sake of argument, that the relation between Mann and the contestant was, in its origin, meretricious, does the evidence satisfy a reasonable mind that it subsequently became matrimonial? Is it likely that the relation of lover and mistress could continue years beyond the capacity of the man or of the woman to reciprocate such attentions as might be expected between lover and mistress? Is it likely (and it is with probabilities that we must deal to some extent) that the contestant voluntarily made a false statement to the unimpeached witness, Mrs. Badger, upon the subject of her relations to Mann, when, as she said, he was a total imbecile, when he had ceased in any possible way to be attractive to her as a lover?

Or was she tied to him at that time, as she says, by her sense of obligation to him as his wife, because prior to that time she had been married to him and he had been a good husband? Is it probable that the contestant would have made the statement to this witness that she had been advised by some of her friends, in consequence of his condition, his habits, his drunkenness, his utter worthlessness, to get a divorce from him if the relation she had theretofore sustained to him had been that of his mistress? It may be that she would, but I have no perception that can carry me to that point. I believe that the contestant, when she had this conversation with Mrs. Badger, stated the honest convictions of a womanly heart and an affectionate nature towards a man who at some time prior thereto had been to her the man of her choice, of all the men in the world, as her husband.

This case proceeds: "A present agreement between competent parties to take each other for husband and wife constitutes a valid marriage, even if not in the presence of witnesses." Now, it is claimed by the contestant that there is no proof that there was ever any promise of marriage between these people. I do not recollect any direct evidence of a contract between them or evidence directed to that particular inquiry: "Did you ever agree between you to become man and wife?" If any evidence of that character is in this case, I have not been able to remember it. But the contestant testified that she never did make any contract of that character, and that he never made any such contract with her. If her testimony is to be believed, and that no words of that import were spoken

between them, we are still just this side of determining that there was no valid marriage between Mann and herself, because the law, in the language of the Court of Appeals, is that such a marriage may be proved by showing actual cohabitation as husband and wife, acknowledgment, declarations, conduct, repute, reception among friends, neighbors, relations, and the like. Upon the proofs in this case, can any unbiased, unprejudiced man come to any other conclusion than that Joshua J. Mann and Eva L. Steele were lawful husband and wife from the time, or from near the time, they first met to the very day when the ceremony of marriage was performed between her and Hamilton? Whether Hamilton knew of the intimacy of Mann and Eva, and all that such intimacy implied, is not a question for me to decide. Even, if he, as a lawyer, had passed upon a confession made to him, if you please, by Eva and by Mann, of their relations, it is of no consequence. If they had made this contract which is established by repute and conduct and declaration of marriage, it was utterly impossible for Hamilton, if he were willing, to contract a lawful marriage with this contestant. The evidence satisfies me that if the relation between Mann and the contestant was, in the beginning, meretricious, it subsequently became matrimonial. I ought to refer to an item of evidence which has very great weight with me upon this point. The motive of the contestant in confessing (after first denying) her improper relations with Mann is easily discovered if she intended to tell an untruth on the subject, for, if she could persuade the court that she was lawfully married to Hamilton, she would have the valuable pecuniary

rights of his widow. Hence her statement is to be taken with at least suspicion, and must be carefully examined and weighed against the evidence of others who have no interest to subserve, and which contradict it. Joshua Mann, in her presence and hearing, (and in my view, after consultation with her upon this very point of his testimony,) went upon the witness stand in the court-room, in Pennsylvania, and declared, under the obligation of his oath, that he met her in Philadelphia several years before and married her, and that she was his wife. There can be no doubt in the mind of anybody who listened to the testimony about the truthfulness of the witnesses who testified to hearing him so swear in her presence. But, quite aside from all the evidence of the other witnesses who were present at this same trial, members of her family, who saw them both, aside from the strong evidence which is given by the signature upon the hotel register of her own brother writing her name and that of Joshua J. Mann as husband and wife, the oath of Mann, at that time, where he had no motive on earth to tell a lie, must overcome the oath of the contestant upon the witness stand here, when she had such vital interests at stake. I regret that duty compels me to say anything in the way of criticism of this contestant, and I shall content myself in the discharge of that duty by saying simply that substantially her evidence is unworthy of belief. I do not believe her. And I hold and decide in this case that on the 7th day of January, 1889, the date of the ceremony of marriage between herself and Robert Ray Hamilton, this contestant was the lawful wife of Joshua J. Mann, and

that her marriage to Robert Ray Hamilton was void, and that consequently she has no standing in this court to contest the probate of the paper propounded as his last will and testament.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM.
SURROGATE.—January, 1891.

MATTER OF LANGLOIS.

In the matter of the judicial settlement of the account of GOTTLOB F. KROTEL *and others, executors of the will of* CAROLINE L. LANGLOIS, *deceased, executrix of the will of* MARGARET LANGLOIS, *deceased.*

The Surrogate has power to approve the account of an executor to which objections have been filed but which is correct in every particular and so admitted in open court by the attorney for the objector, when no vouchers are or can be produced for several items thereof.

ACCOUNTING of Gottlob F. Krotel, Ernest Harvier and Johann George Schlinghoff executors of the will of Caroline L. Langlois, deceased, executors of the will of Margaret Langlois.

CHARLES FOX, *for executors.*

MILLER, PECKHAM & DIXON, *for* UNION TRUST COMPANY, *contestants.*

THE SURROGATE.—The referee has followed the

direction given him in my memorandum of November 13, 1889, and has made his report, finding the account in all things correct except as to certain rents collected. Exception was filed to this finding upon the ground that the evidence did not justify it. The question to be decided is of great concern to the accounting parties, and I have been constant in my efforts to find some precedent decisions. I have not been successful, because, no doubt, just such a condition of things has never before been the subject of judicial inquiry. We have here the bald question of the power of the Surrogate to approve the account of an executor, confessedly correct in every particular, so admitted in open court by oral statement of the attorney for the objector, when no vouchers are or can be produced for several items thereof. Reflection must satisfy all that the Surrogate, in the nature of his office, may ascertain by evidence morally admissible where truth and justice lie, and decree accordingly. After the painstaking investigation by the referee into all the facts and circumstances affecting each item of credit claimed by the accounting parties, and the substantial compliance by them with the provisions of the statute, as construed in my former memorandum, he has concluded that the account is correct. Counsel for the objector is of the same opinion, and stated on the argument that he believed the account to be correct, and would be glad if the Surrogate could find a way to approve it. On the proof taken by the referee, I think a *prima facie* case of the expenditures claimed by the representatives of the deceased executrix was made out. The deceased executrix was allowed to testify in her own behalf,

without objection, (such being the effect of the admission of her books of account in evidence). Whether these books were competent evidence need not be considered. Their introduction was not objected to, and therefore any objection that might have been interposed was waived. The language of Judge GRAY, in Matter of Wagner's Estate, 119 *N. Y.* 31, seems appropriate here. The decision of the question in that proceeding is in the teeth of the letter of the statute, but the learned judge's reasoning is admirably consistent with its spirit. He says: "The general jurisdiction conferred upon the Surrogate's Court in matters relating to the conduct of executors and administrators would seem meaningless, if not an absurdity, if it did not comprehend the right to decree intelligently, and upon equitable principles, and to order their conduct upon principles of justice and of reason." In the case at bar the objector places upon the record an objection to the allowance of certain expenditures of the executrix, because no vouchers are produced, and, in the next breath, admits that he is satisfied the account is correct, and indulges in the hope that the Surrogate will find a way to sustain it. The purpose of the objection evidently is to cast upon the Surrogate the responsibility of ascertaining the state of the law, and by his decision possibly inflict a great wrong upon the executrix. This anomalous position is taken by the objector under the mistaken notion that it may be held liable by a party interested in this estate, in whose behalf it appears, for failure to object. My own belief is that the admission on the argument by the attorney for the objector that the account is cor-

rect is a complete waiver of the objection. However, I do not place my decision on that ground. It may be that proof of the character required for a literal compliance with section 2734 has not been furnished, but the evidence admitted, and the practical acquiescence of the contestants in the correctness of the items, convinces me that justice demands their allowance. "Moral certainty is descriptive of the kind of certainty which is attainable by means of moral evidence, and it is that degree of assurance which induces a man of sound mind to act without doubt upon the conclusion to which it leads." Wills, Circ. Ev. If it were the law that where the Surrogate has this belief he must, nevertheless, give judgment against his convictions for lack of technical proof, then, in the language of the learned judge in the Wagner Case, *supra*, "we must not only ignore the spirit for the letter of the statute, but we should have to regard that officer as exercising an authority not moved by his judgment, but may be mechanically set in motion, regardless of the rights of parties. I cannot assent to such a view, where the letter kills." In the case of Willcox v. Smith, 26 *Barb.* 343, the learned judge, delivering the opinion of the court, after stating the stringent rules to which executors and administrators are held in establishing their accounts, and pronouncing them "eminently just," uses this significant language: These rules "should not be departed from except in cases of the most urgent necessity, and in order to prevent absolute injustice." I am satisfied that the learned referee was right, and I sustain his report.

The provision of the will operated as an equitable

conversion of the real estate, and the referee erred in ruling that the deceased executrix was not accountable for the rents of such realty. Lent v. Howard, 89 *N. Y.* 169; Greenland v. Waddell, 116 *N. Y.* 234.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—January, 1891.

MATTER OF BAITY.

In the matter of the estate of WILLIAM BAITY, *deceased.*

Upon the accounting of the administrators with the will annexed of a testator, an insane son of testator, was represented by a special guardian who interposed no objections. Both the account and the decree recited the fact that the interest of the lunatic in the estate had been sold by virtue of certain judgments recovered against him and had been purchased by a devisee under the will. The judgments had been recovered before the son had become insane. Afterwards the wife of the lunatic and his special guardian made an application to set aside the decree on the ground that no sufficient proof had been offered on the accounting in regard to the acquisition of the lunatic's share by the devisee, and that the administrators with the will annexed upon their accounting withheld important facts and statements touching the rights and interests of said lunatic and made unlawful claims, to the great wrong of said lunatic. The petition did not state what specific acts had been comitted or omitted by the administrators. *Held*, that there being no allegation denying the transfer to the devisee, and the other allegations of the petition being entirely indefinite, the application should be denied.

THE deceased left a will, which was duly admitted to probate in 1871. His son, John R. Baity, and son-in-law, Isaac Gott, were the executors named

therein. Baity, the son, alone qualified, and acted until his letters were revoked in 1875 on the ground that his circumstances had become so precarious as not to afford adequate security for the proper discharge of his duties. Whereupon Isaac Gott qualified, and subsequently, in November, 1886, died, and his widow, Mrs. Eliza Gott and John H. Moran were, in 1887, appointed administrators with the will annexed. The estate left by William Baity, in which his children were concerned, consisted chiefly of real property. In March, 1888, the administrators rendered an account of their proceedings, and a decree was entered thereupon, awarding the residue of the estate, except a fund held in trust, to Mrs. Gott. Maria Baity, the petitioner in this matter, is the wife of said John R. Baity, who has been judicially declared to be a lunatic, and as such is an inmate of the Insane Asylum on Ward's Island. He was such lunatic at the time of the accounting proceeding, on which he was duly represented by a special guardian appointed for that purpose. The petitioner prays that the decree on the accounting be set aside, etc., and the special guardian concurs in the application. It is alleged in the petition that on the said accounting Mrs. Gott claimed to have acquired all of said lunatic's share of the estate under a judgment and sale thereof, and that no proof to that effect was offered by her; that the administrators in their accounting withheld important facts and statements touching the rights and interests of said lunatic; and claims that there was material error in suppressing facts and making unlawful claims on

the part of the accounting administrators, to the great wrong and loss of said lunatic.

The answer to the application states that John R. Baity was adjudged a lunatic in the month of August, 1880; that all of his right, title and interest in and to the said estate were sold under and by virtue of certain judgments recovered against him prior to his being declared and adjudged insane, and that the whole had been purchased by Mrs. Gott and is owned by her; that in the petition for said accounting, resulting in the decree complained of, occurs this language. "That all of the above are of full age and sound mind except said John R. Baity, who has been adjudged and declared insane, but whose entire interest in said estate has long since been sold under and by virtue of certain judgments recovered against him, and has been conveyed to the said Eliza Gott." That the decree entered upon said accounting directed that certain moneys be paid to Mrs. Gott in full of her share and also in full of John R. Baity's share, which had been sold to her as aforesaid by Frank A. Ransom, a referee duly appointed for that purpose by the Court of Common Pleas of the city of New York, and conveyed to her; which sale occurred in 1874, and before the sanity of said John R. Baity was questioned. The answer also alleges that the petitioner, Maria Baity, has no interest whatever in the estate. On an examination of the verified account it appears to have been alleged that the entire interest of John R. Baity under the will was sold, as stated in the petition, and was conveyed to Mrs. Gott by a referee appointed for that

purpose by the Court of Common Pleas of the city and county of New York.

A. B. TAPPEN, *for the motion.*

OLVIDE DUPRE, *opposed.*

THE SURROGATE.—Although not distinctly alleged in the petition it may be gathered from the facts stated therein that it is sought to set aside the decree upon the ground of fraud. There can be no doubt that the lunatic was duly cited to attend the accounting, and that he was duly represented by special guardian. Indeed the fact is admitted. The petitioner's whole case seems to rest chiefly on the fact that no proof was produced to the court showing the judicial sale of John R. Baity's interest and the purchase thereof by Mrs. Gott. It will be observed that the petitioner nowhere denies such sale and purchase, and does not, therefore, attempt to establish any fraud in that respect. Nor does she allege any newly discovered evidence, or clerical error in the proceeding. It is true that the petition alleges that on the accounting the administrators withheld from the court important facts and statements touching the rights and interests of the lunatic, and made unlawful claims. What facts and statements were withheld? What were the unlawful claims made by them? The petition fails to disclose them—to tell us what those facts were, or to show how any claims made were unlawful. Had it been shown that the lunatic's interest, claimed to have been sold under judgments and purchased by Mrs. Gott six years before he was adjudged insane, and

long before she became administratrix, had never been so sold or purchased, a different question would have been presented. Then the decree could have been challenged as fraudulent.

If it were true that there was no proof, or insufficient proof, of the claim of Mrs. Gott to the share of the lunatic, that fact would not render the proceeding obnoxious to the charge of fraud, clerical error or other like cause, for which the Surrogate, under the provisions of subdivision 6 of section 2481 of the Code, is authorized to open, or set aside the decree. The only remedy would be an appeal. Singer v. Hawley, 3 *Dem.* 571; affirmed by Court of Appeals, 100 *N. Y.* 206. But there was proof, whether sufficient or not to warrant the decree, is immaterial. The sale of John R. Baity's interest under legal proceedings and the purchase thereof, were alleged and set forth both in the verified petition and also in the verified account, and to which, thus challenged, no objection was interposed by the special guardian, or by any other person. This statement was properly made in the account, and uncontradicted, was sufficient evidence on which to base the decree. Dayton says, (Practice, 508,) "the executor or administrator may also include in the account such statements of any facts or circumstances which may have attended the administration, as he may deem important to a correct understanding of the manner in which he may have performed the duties of his trust, or to a just settlement of the affairs of the estate." See also Redfield, Practice, 759, 760. The petition and account of proceedings are in the nature of pleadings, and when properly verified are, in gen-

eral, as to the facts stated, unless questioned, to be regarded as true.

The petitioner herein, the wife of the lunatic, appears to have no legal interest in the estate which would render her a proper party to the proceeding. Whether validity is rendered to the application by the fact that the special guardian joins in it, has not received much consideration. It has been deemed best to decide the matter upon its merits.

An order will be entered denying the application.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—December, 1890.

MATTER OF BACH.

In the matter of the judicial settlement of the account of NEVIN W. BUTLER *and* ALEXANDER KIRKLAND, JR., *executors of the will of* JOHN C. BACH, *deceased.*

Testator at the time of his death was a member of a partnership composed of testator and one N. The partnership articles provided that in case of the death of testator and the continuation of the business, the executors of testator should pay to N. such annual amount as should be agreed in lieu of the services of testator. The will of testator provided that the executors might employ so much of testator's capital in the business as in their opinion might be advantageously so employed, and upon such terms as to profits and losses as they might deem just and proper. For several years testator had taken no active part in the business. *Held*, that under the will the executors had power to enter into a partnership with the surviving partner, and that an agreement by them to allow the surviving partner $2,500 a year, chargeable against the estate, in lieu of the services of testator, was authorized.

MATTER OF BACH.

One of the executors, B., had been in actual charge of the business for some time before the death of testator and it appears that his services were very necessary to the business. After testator's death B. continued to perform in the new firm, composed of the executors and the surviving partner, the same duties as he had performed in the old firm. The surviving partner, N., who never interfered in any way with the business, paid the executor B. a salary for conducting the business. *Held*, that such an agreement was not improper.

For the purpose of settling the estate and realizing on the assets, the plant and good-will of the business were sold at auction by the executors and the surviving partner. At this sale the surviving partner became the purchaser of such plant and good-will for a sum only about one ninth what the good-will alone was worth. One item of plant alone was worth twice the whole price paid upon the sale. Afterwards the surviving partner sold to one of the executors, a half interest in such plant and good-will, for half the amount so paid by him, and then they formed a new partnership for conducting the same kind of business. *Held*, that this transaction was within the prohibition of the law of even an indirect purchase by an executor of the assets of the estate.

Where the assets of the estate have been purchased by an executor in violation of law, and by reason of the circumstances it is inexpedient or very difficult to obtain a fair value of such assets upon a resale, the Surrogate will not set aside the sale, but will surcharge the executor's account with the difference between the amount realized on the sale and the value of the property sold as shown by the executors' inventory.

Two pictures belonging to the estate were sold at auction very much below their value, to a daughter of one of the executors, through instructions conveyed from the daughter to the auctioneer through that executor. Each executor purchased from this daughter one of the pictures at a sum immensely below their inventoried value. *Held*, that a resale of the pictures should be ordered.

After the formation of the firm composed of the surviving partner of the former firm and one of the executors, the executors issued a circular to the persons interested in the estate, alleging that they had an offer from the new firm of a certain price for the outstanding accounts, and further stating that they had no interest but that of the heirs, concealing the fact that one of the executors signing the circular was one of the members of the firm which wished to purchase the outstandings. The sale of a portion of the outstandings was made by the consents obtained from the heirs by this circular, in ignorance of the fact that the executor was an interested party to the transaction. *Held*, that the sale should be set aside, that the executors should account to the estate for the amounts received from such portion of the outstandings as have been realized on, that there should be a sale of the interest of the estate in the ac-

counts unsold, that if, upon resale, they did not produce a larger sum than that realized by the executors, then the former purchase was to stand.

ACCOUNTING of the executors of the will of John Bach, deceased.

R. B. MCMASTER, *for the executors.*

PURDY VAN VLIET, *for the contestant.*

SAMUEL S. THOMAS, *special guardian.*

THE SURROGATE.—The testator died in January, 1885. For nearly thirty-five years prior thereto he had been engaged in the business of selling proprietary medicines, chiefly Townsend's Sarsaparilla. During the greater part of this time the executor Butler had been manager and confidential clerk. At the time of the testator's death the firm was composed of the deceased and E. B. Nostrand. Subsequent to the death of the testator and up to January, 1888, the business was continued under the firm name of Bach & Nostrand, the parties thereto being the qualifying executors of the testator and the surviving partner. The executors and the surviving partner entered into a written agreement for the continuation of the business, which provided for sharing equally in the profits, but the new firm to pay to the surviving partner, as indemnity for the loss of the services of the testator, the sum of $2,500 a year. While the business was being conducted under this agreement, Butler remained as manager for Mr. Nostrand, drawing a salary paid by the latter until the liquidation, in September, 1888, originally at the rate of $4,000 a year, but

which was subsequently reduced because of the diminution in the business of the firm. It appears that while the business was being thus conducted by the executors and the surviving partner, the latter was paid $7,625, under the terms of this agreement, which was in addition to his profits under the articles of copartnership. This sum was fixed on the basis of the salary paid to Butler prior to the death of Mr. Bach, which was $3,000 a year, for the reason, as stated by Butler, that as executor he could not take any salary from the business, and afterwards Nostrand agreed with him (Butler) to conduct the business, and pay him. There was practically no difference in the character of the duties performed by Butler before and after the death of the testator. Nostrand never interfered in any way with the business. For several years prior to his death, the testator was never at the office, and it would seem as if Butler were an indispensable adjunct to the proper conduct and continuation of the business.

Objection is made to the salary paid to Nostrand for the management of the business. The fundamental test to be applied to the actions of an executor in the administration of his trust is whether he has acted in good faith and conscientiously striven to carry out the intentions of his testator. The will provides that the executors may "continue so much of the capital employed by me in the business of the firm of Bach & Nostrand as in their opinion may be thus advantageously employed, and on such terms as to sharing in the profits and losses as they shall deem just and proper and for such length of time as will be

consistent with the due execution of the powers and trusts herein contained." There is no doubt in my mind but that this language authorized the executors to enter into an agreement with the surviving partner for the continuation of the business. The articles of copartnership under which the testator did business were excluded by the referee. This ruling was clearly improper. Inasmuch, however, as the documents have been marked for identification and are included among the exhibits returned to the court, I will consider the exception taken to the ruling of the referee in this regard as sustained, and in arriving at a conclusion I have considered the documents as in evidence. They provide expressly that the executors, in case of his death and the continuation of the business, "shall pay to Nostrand such annual amount as shall or may be agreed upon in lieu of the services of said Bach." The agreement entered into by the executors with the surviving partner, in pursuance of the authority vested in them by the will, and the articles of agreement between the members of the old firm, provides that the executors "should allow and pay over to the party of the second part (Nostrand) for the loss of the services of the late John C. Bach, a sum at and after the rate of $2,500 per annum, ... and that the said party of the second part may charge the same to the said executors and trustees as a portion of their share of said profits." I can see nothing improper in the arrangement entered into between the executor Butler and Nostrand, having in view the retention of Butler in the business. I think that his retention in the business must have been contemplated by decedent.

There is no question made but that the executors in good faith continued the business for the best interests of the life tenant and remaindermen, nor is any evidence given tending to show that in fixing the salary of Nostrand at the sum named they were guilty of any neglect or bad faith. The most that can be asserted in this connection is that they were guilty of an error of judgment, and for this they are not liable.

It is claimed by the objectors that in case this arrangement is approved by the Surrogate, the amount deducted is excessive; the sum charged against the trustees of the estate should be only one half of the salary of Nostrand, and the Matter of Laney (50 *Hun*, 15) is cited, in support of this contention. In the case cited the deceased, his administrator and one Barker were partners under articles which fixed the term at seven years and provided that in case of the death of any of the parties before the expiration of the said term, the partnership might be continued by the survivors until the expiration of the term limited, "and the share of the profits on that part of the capital stock belonging to such deceased partner, less the sum of $2,000, the agreed value of his services per year, shall be paid as often as once in each year to his personal representatives." The administrator treated the $2,000 to be thus deducted as belonging to the surviving partners to be divided between them, but the court held that the estate was entitled to its share of the sum so deducted. This construction was adopted by the court because the copartnership agreement did not declare what should be done with this money that was to be deducted from the share of the

profits belonging to the estate; in the case at bar there is no necessity for resorting to construction to supply a direction which has already been provided by the parties to the agreement. The contracts between the testator and his representatives with the surviving partner expressly state that the sum so withdrawn shall be paid to Nostrand and charged against the share of the profits of the estate. The conclusion of the referee in this respect is therefore sound.

I do not think the surviving partner was entitled to salary during the period, viz.: January 15th to September 1st, 1888, and with this exception the referee is sustained.

The widow of the testator, the life tenant under the will, died in August, 1887, and the executors deeming that the time had come for the conversion of the estate into cash, to divide it into shares and carry out the provisions of the will with respect thereto, proceeded to realize upon the assets of the estate. On March 15, 1888, they sold at auction, at the Exchange Salesrooms in New York city, the good-will of the business, including the plant of the factory and the proprietary rights. The plant which was sold included vats and tubs, bottles, tools and instruments. Prior to the sale the same was extensively advertised in newspapers published in the city of New York, and printed handbills were mailed to each of the legatees. The property was struck down for $300 to a Mr. Scofield, who attended the sale as the representative of Mr. Nostrand. The good-will of the business alone was inventoried at $2,750, and it is in evidence that Nostrand offered that sum therefor. Mr. Butler testified on cross-examination

that the bottles alone, which were included in the sale, were worth $600. Shortly after the sale of the good-will, and in conformity with arrangements which had been theretofore made between them, the executor Butler and Nostrand formed a partnership under the style of Nostrand & Company, and Nostrand conveyed to Butler for $150, a one-half interest in the property purchased for him at the sale by Schofield. From all the evidence in the case I am forced to the conclusion that the transactions in question constitute a purchase by Butler indirectly of the good-will and property and that it comes within the prohibition of the law.

It is an ancient and very familiar doctrine that the sale by an executor or administrator of the property of the estate to himself, either directly or indirectly, whether at private sale or at public auction, no matter how honest, open and fair, may be avoided at the option of the beneficial owner or *cestui que trust* (Davoue v. Fanning, 2 *Johnson's Ch.* 252; Michoud v. Giroud, 4 *How. U. S.* 503; Met. El. R. R. Co. v. Manhattan R'way Co., 14 *Abb. N. C.* 253, and note showing numerous cases wherein the doctrine declared in Davoue v. Fanning has been approved; Boerum v. Schenck, 41 *N. Y.* 182). The principal point in Davoue v. Fanning was whether the plaintiff was not entitled to set aside a sale of certain real estate made by the executor, at public auction, because, by a previous arrangement, he had suffered the property to be bought in for his wife, and executed a deed in pursuance of the sale in trust for her. It was claimed by the defendants that the sale was unobjectionable, having been made at public auction, in good faith, and for a fair price, and

the purchase was not made for his own benefit, but for his wife who was one of the *cestui que trusts*, having an interest in the land. Chancellor Kent said the case fell clearly within the spirit of the principle "that if a trustee acting for others sells an estate and becomes himself interested in the purchase, the *cestui que trust* is entitled to come here as of course and set aside that purchase and have the property re-exposed for sale." At page 259 he says: "However innocent the purchase may be in the given case, it is *poisonous* in its consequences. The *cestui que trust* is not bound to prove, nor is the court bound to judge, that the trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power, distinctly and clearly, to show it. There may be fraud, as Lord Hardwicke observed, and the party not able to prove it. It is to guard against this uncertainty and *hazard* of abuse, and to remove the trustee from temptation, that the rule does and will permit the *cestui que trust* to come, at his own option, and without showing actual injury, and insist upon having the experiment of another sale. This is a remedy which goes deep, and touches the very root of the evil. It is one which appears to me, from the cases which have been already cited, and from those which are to follow, to be most conclusively established." The rule seems to have been established in this case that the *cestui que trust* may elect to set aside the sale and that it would be proper for the court to order a resale at the price bid by the trustee, and if it does not sell for more, then the purchase is to stand. The right of the *cestui que trust* to this election is recog-

nized in Barker v. Smith (1 *Dem.* 290), where it was held that "if the property is still in the possession of the executor, it is within the power of the court to require him to restore it to the estate. He ought not to have bought it and ought not to be allowed to retain it against objection, even if it were admitted that he purchased in good faith and paid an adequate consideration, but the parties entitled to object to such purchase are at liberty to sanction it. . . . ." In Jackson v. Walsh (14 *Johns.* 411) it was stated that the rule is to order a re-sale, and if the property sells for more, the *cestui que trust* takes the surplus, otherwise, the original sale stands.

It would be unsafe and improper to direct a re-sale of the good-will and plant in the present case, for reasons that must be obvious upon reflection. In the first place, some portion of the property must have been disposed of since the auction sale. Second, the rights of Nostrand could not be affected by a decree of this court, and in a proceeding to which he was not a party. Third, even in case the good-will were put up at auction, it is extremely improbable that an adequate price would be realized therefor, in view of the litigation liable to ensue because of the conflicting rights of Nostrand and the purchaser at such a sale. It seems, therefore, to be a case for the application of the rule laid down in Schenck v. Dart, 22 *N. Y.* 420. In that case, the executors sold certain shares of stock at the Merchant's Exchange, the par value of which was $1,000. The stock was inventoried at 80 per cent, and sold at 56 per cent of the par value. The court found that Norman Dart, a brother of one of the ex-

ecutors, was the nominal purchaser, but that the real purchaser was Russell Dart, and that this being so, "the law peremptorily determines that the sale was ineffectual. Russell Dart was executor and trustee, and the powers of sale conferred upon him by the will of the testator could not be exercised in his own favor, either directly or indirectly. He could not be both vendor and purchaser at any price. He was, therefore, properly charged with the value of the stock. Upon the inquiry of what was the value, we think the best evidence which the case presents is the sworn inventory of the executors themselves." The court refers in its opinion to the fact that aside from the evidence furnished by the inventory, the testimony as to the value of the stock was undecisive and unsatisfactory. In the case at bar we have not only the sworn inventory of the executors as to the value of the good-will and plant, but we have positive evidence of the offer by Nostrand to pay such inventoried value for the good-will alone. The finding of the referee in this regard is overruled, and the account of the executors must be surcharged with the share of the estate in the difference between $300, the amount realized upon the sale, and $2,750, which I find to be a proper sum to be charged against the executors for the property.

In August, 1888, the executors issued a circular to the various legatees, stating that they were disappointed at the unavoidable delay that had occurred in closing the estate, explaining the causes therefor and stating that with a view to winding up the estate, so that the heirs and legatees might know what they would have to expect, and receive their income on the

residue, they had received an offer from their successors, Messrs. Nostrand & Company, to purchase from them all the outstanding consignment accounts at a discount of 33 1-3 per cent, they to pay cash for the same on a proper assignment or bill of sale. Enclosed with the circular was a consent for the signature of the legatees, to be returned to the executors. The only evidence in any way indicating bad faith in the conduct of the executors appears in this circular. The last paragraph reads as follows: "We prefer, however, to leave the matter to the heirs of Mr. Bach's estate to act and advise us as they think best; *we have no interest but theirs*, and if they prefer to await the further delays and expenses of liquidation, we shall be quite content to go on with the same. You must be the judges, and we shall act as you may all agree." There is no intimation contained in this circular that one of the members composing the firm of Nostrand & Company, which was making the offer, was one of the executors who signed the circular. This fact was not known to the legatees until a subsequent date. The assertion contained in the circular that "we have no interest," certainly was untrue and calculated to mislead. There is no doubt but that under the decision in Davoue v. Fanning (*supra*), and other cases cited, the sale of the said accounts might be disaffirmed by the legatees were it not for the consents which it is claimed estops them. If it were necessary, in order to sustain the conclusion that I have reached, to find that the concealment by the executor of his interest in the purchase rendered the consents ineffectual to establish the acquiescence of the legatees therein, I should do so,

but there is authority to sustain the proposition that, notwithstanding their acquiescence at the time, they may subsequently repudiate the transaction. In Munro v. Allaire, 2 Caine's Cases in Error, 183, cited in the opinion of Chancellor KENT, *supra*, an executor, with power to sell real estate, purchased of the widow, who was a devisee, and also one of the executors, her right in the acquired estate. The purchase was charged to have been fairly made, after long consultation, in which she was assisted by a friend, and that the executor gave a full price and more than then had been previously offered by another. It was held, nevertheless, that the trustee could not himself purchase. The finding of the referee with reference to the matter of accounts so sold by the executors is overruled and the exception taken is sustained. The course to be pursued with reference to these accounts is pointed out in Randall v. Errington, 10 *Vesey* 423, cited with approval in Davoue v. Fanning, *supra*. In that case it was held that the sale was fair and the purchase by the trustee at auction for a full price, but, inasmuch as he had subsequently sold a part at some profit, the court opened the sale at the request of the *cestui que trust* as to the parts not sold, and held the trustee to account for the profit on the part he had sold. The executors must, therefore, account to the estate for such portion of the accounts included in the sale as have been realized upon, and the decree to be ultimately entered herein must direct a sale of the interest of the estate in the accounts *unsold*, and if, upon such sale, they do not realize a sum larger than that realized by the executors, then the former purchase is to stand.

Among other assets sold by the executors were two pictures which were subsequently purchased by Mrs. Robinson, a daughter of Butler, the executor. Mrs. Robinson was not present at the sale, but the bids were made by the auctioneer himself, under instructions from her through Butler. Butler afterwards purchased one of the pictures from his daughter, and the other was purchased by the other executor at sums immensely below the inventoried value. The remarks above, with reference to the accounts and good-will, apply to these pictures, and the decree should direct a resale, as in the case of the accounts not realized upon.

The only remaining point to be considered relates to the excessive commissions allowed by the former decree. Counsel and referee are in error as to the manner in which this matter should be adjusted. The proper course is to first ascertain what the commissions should have been in the former decree, and the fund with which the executors are chargeable should be increased accordingly, but only so far as concerns the parties as to whom the former decree is not *res adjudicata*. The commissions should have been $923, and, so far as these minors are concerned, who are not bound by the former decree, the principal fund in which they are interested should be increased accordingly. The decree to be entered should contain appropriate recitals to that effect.

CHAUTAUQUA COUNTY.—HON. DANIEL SHERMAN, SURROGATE.—January, 1891.

MATTER OF SHERMAN.

In the matter of the estate of SEPHRONIA H. SHERMAN, *deceased.*

Testatrix, who died leaving her surviving a husband, mother and two children, provided in her will as follows: "I, having heretofore advanced money to my son Burke L. Sherman, to a larger amount than I am now able to give to my daughter Abba, and there being a sum of money coming to me from my father's estate now deceased, at the death of my mother, which as I understand will go to my two said children in equal amounts in case I should die before my mother, two children me surviving, I request my son, Burke L. Sherman to give his share to his sister Abba to be used for her education and maintenance." The mother of testatrix died after her. *Held*, that testatrix died intestate as to this fund, that the provision of the will raised a presumption that there had been advancements to the son, which threw on the son the burden of showing that there had been such a change of circumstances as to avoid such presumption. In the absence of such proof by the son, the fund referred to should be divided in the proportions of two thirds to the daughter and one third to the husband.

APPLICATION for a construction of the will of Sephronia H. Sherman, deceased, upon the judicial settlement of the account of the executrix thereof, as to a certain fund bequeathed by said will.

A. B. OTTOWAY, *for executrix, and as special guardian for* ABBA M. SHERMAN.

H. C. KINGSBURY, *for* BURKE L. SHERMAN, *heir, and* GEORGE W. SHERMAN, *husband.*

THE SURROGATE.—The deceased died May 12, 1883.

She made her will, dated April 17, 1883, appointing her sister, Elizabeth M. Wright, executrix. She left a husband, George W. Sherman, and one son, Burke L., of full age, and one daughter, Abba M., a minor, aged 12 years, her only surviving heirs at law and next of kin. She left various other articles of household furniture and personal property which she bequeathed to her husband, her two children, and other relatives. The executrix of her will has received from the estate of her father, Willis Royce, a separate fund of $672.88, to which this proceeding relates, from which there remains, after paying funeral expenses and expenses of administration and debts, $530.11 for distribution to the heirs and next of kin entitled thereto. The counsel for the executrix and Abba M. Sherman, minor, claims that this balance should all be paid to Abba, and that neither the surviving husband of the deceased nor her brother, Burke, should receive any of it, by reason of an alleged advancement to Burke by the testatrix in her lifetime. The counsel for Burke L. Sherman and the surviving husband, George W. Sherman, claims that such husband of the testatrix and her said son, Burke, and daughter, Abba, should each receive on distribution herein one third of said balance. The will contains this provision: "I having heretofore advanced money to my son, Burke L. Sherman, to a larger amount than I am now able to give to my daughter, Abba, and, there being a sum of money coming to me from my father's estate, now deceased, at the death of my mother, which, as I understand, will go to my two said children in equal amounts, in case I should die before my mother, leav-

ing my two children me surviving, I request my son, Burke L. Sherman, to give his share to his sister, Abba, to be used for her education and maintenance." By the will of Willis Royce, father of the testatrix, his wife was to and did have the use of this fund during her life. She died subsequent to the death of her said daughter, Sophronia. It would seem, and I find, that the testatrix died intestate as to this particular fund. She does not undertake to dispose of it by her will, but gives her understanding, as a matter of law, that upon the death of her mother it would go to her two children in equal amounts, and requests that her son, Burke, in consideration of her prior advancements to him in a larger amount than she was then able to give to her daughter, Abba, should give his share to his sister, Abba, to be used for her education and maintenance. This language does not make a bequest to Abba of one half of the fund, or of any part of it. The testatrix was evidently mistaken as to the legal rights of her husband in this fund on distribution, as she was also to the legal effect of her advancement to her son, Burke. The important question to be considered is whether the language of the will and facts here given constitute sufficient proof of an advancement to Burke by his mother, the testatrix, to authorize the court to hold that such advancement was actually made. No oral testimony was given upon the hearing herein bearing upon the question of such alleged advancement, or of any change in the equitable or legal rights of the respective heirs since the date of the will. The learned counsel for Burke did not, upon the hearing, allege or claim that such advance-

ment had not been actually made, but claimed that circumstances might have changed after the will was made to excuse Burke from complying with the request of his mother to give his share in this fund to his sister, Abba, for her education and maintenance. Abba was only 12 years old at the time the will was made, and Burke was of full age. If there was such an advancement, as is alleged in the will, and not disputed, Abba is entitled to her allowance of it on distribution, notwithstanding the apparent ignorance of the testatrix as to the distribution of estates under the statutes. I am of the opinion that the burden of proof rests upon Burke L. Sherman to show that no such advancement had been made, or that circumstances had changed, avoiding it. I do not regard the request of the testatrix of her son, Burke, as amounting to a bequest, or as of any importance further than showing the wishes and intent of the testatrix, as Abba would be entitled to the benefit of such advancement, if actually made, without such request. And it appearing that the fact of such advancement to Burke by his mother in her lifetime to a larger amount than she was able to give to her daughter, Abba, is not disputed, and appears to be concealed, I find that it was made. In Beebe v. Estabrook, 79 *N. Y.* 246, the court say: "Whether a gift be one designed as an advancement is always a question of intention, and is generally presumed when property is received by a son from his father." Alexander v. Alexander, 1 *St. Rep.* 508. Such presumption is increased in this case, where the son, receiving the advancement, was of full age, and the only other heir affected by it is his sister, now a minor,

and who was only 12 years old at the date of the will. The property consists of a single item of money coming from a single source. The account shows a small increase of interest since its receipt, and it is improbable that any further change since the will was made as affecting the rights of the several persons interested therein. Story, Eq. Jur., §§ 1202–1204; Welton v. Divine, 20 Barb. 9; Sanford v. Sanford, 5 Lans. 491; Proseus v. McIntyre, 5 Barb. 424; Partridge v. Havens, 10 Paige, 618; sections 75–77, 2 *Rev. Stat.*, p. 97. I direct a decree that Abba M. Sherman is entitled herein on distribution of such fund of $530.11 to two thirds thereof, and that said George W. Sherman is entitled to the remaining one third of same.

OSWEGO COUNTY.—HON. ALFRED C. TENNANT, SURROGATE.—February, 1891.

MATTER OF TIPPLE.

In the matter of the estate of PETER J. TIPPLE, *deceased.*

By section one of chapter 406 of Laws of 1889, the widow of a decedent who dies intestate leaving a widow and descendants has a life interest in real estate of the value of one thousand dollars, in addition to her dower. By section two of the same act it is provided that in such case, in addition to the article declared to be exempt from appraisal by 2 *Rev. Stat.*, chap. 6, tit. 3, § 9, there should be set apart to such widow and children personal property of the value of one hundred and fifty dollars; and if her interest in the real estate of her deceased husband together with the dower right and the said one hundred and fifty dol-

lars should be less than one thousand dollars, then said appraisers should set apart for her use personal property which together with said real estate should amount to one thousand dollars in value. *Held*, that the widow is under this statute entitled to so much personal property as together with the interest in the real estate and the one hundred and fifty dollars amounts to the sum of one thousand dollars, and that in fixing this amount her dower in the real estate is not to be considered.

APPLICATION by Ann M. Tipple, widow of Peter J. Tipple, to have certain personal property set apart to her from the estate of her deceased husband.

GRAHAM & BALDWIN, *for executor.*

JOHN B. HOLMES, *for the widow.*

THE SURROGATE.—The deceased died on the 6th day of February, 1890, leaving a widow and several children. At the time of his death he was the owner of about one half of an acre of land, upon which was a dwelling-house of the value of $300, and personal property exceeding in value $1,000. Appraisers were appointed, and they returned an inventory of personal property, which was filed on the 17th day of May, 1890. The appraisers inventoried and set apart as exempt to the widow certain specific articles, as required by chapter 470 of the Laws of 1874, but they did not inventory and set apart to the widow any personal property, as required by chapter 406 of the Laws of 1889, excepting certain articles of personal property of the value of $8.85. The widow now asks the court to direct the appraisers to set apart to her the property which she is entitled to under the statute last above mentioned. The question thus presented for determination involves in a measure a construction of

such statute. So far as my examination has extended, there are only two decisions by which an attempt has been made to give a construction to said statute. In The Matter of Daggett's Estate, 2 *Connoly Surr. Rep.* 230, the learned Surrogate of Cattaraugus county decided that the value of the additional amount of personal property to be set apart to the widow under said statute was the difference between $1,000 and the sum of the values of present life-interest in $1,000 worth of real property and her dower, together with the $150 in personal property. Later, in the case of Steward's Estate, 10 *N. Y. Supp.* 24; 30 *St. Rep.* 438, the Surrogate of Chautauqua county held that such additional amount of exemption was the difference between the sum of $1,000 and the present value of the life interest in the $1,000 worth of real estate given her by the first section of said statute, and that the words "in addition to her dower right, and together with said $150," used in section 2, should be construed to mean "exclusive of her dower right and said $150." In searching for the true meaning of this clumsily prepared statute, I am still more embarrassed by these two decisions in conflict with each other. It is reasonably clear that by section 1 of this statute, where the deceased leaves a widow and a descendant or descendants, the widow is entitled, over and above her dower interest, to the use during her life of an additional portion of the real estate of her deceased husband, not exceeding in value $1,000; and where the deceased leaves a widow and no descendant or descendants, the widow is entitled to the absolute ownership in fee of such additional portion of real estate.

Before the enactment of this statute the widow had a dower interest in the lands of her deceased husband, to wit, the use of one third thereof during her life. This dower interest is not taken away from her, and is in no manner affected by this statute. Section 1 undertakes to give the widow, where there is a descendant or descendants of the deceased, a new and additional interest in the real estate of her deceased husband, so that she becomes entitled to two interests in such real estate: (1) Her dower, being the use during life of one third thereof; and (2) the use during life of $1,000 worth of such real estate. It was the duty, I think, of the appraisers to have set off to the widow "necessary household furniture, provisions, or other personal property," in their discretion, to the value of not exceeding $150. Such was their duty, before this statute was passed, under chapter 157 of the Laws of 1842, and it is no less their duty to have done so under section 2 of chapter 406 of the Laws of 1889. This is so because in this respect the language employed in the two statutes is substantially the same. The appraisers have only set apart to the widow property of the value of $8.85, or $141.15 less than they should have done. After the appraisers shall have discharged their duty in this regard by setting apart to the widow in necessary household furniture, provisions, or other personal property to the value of $150, the question then arises, what further or additional personal property should be set apart to the widow under section 2? I regret that I cannot concur in the conclusion reached in the Daggett Case, *supra*, in the respect that the present value of the dower interest of the widow should be added to her

additional interest given by the first section, nor in the holding in the Steward Case, 10 *N. Y. Supp.* 24; 30 *St. Rep.* 438, that the $150 exemption should be excluded with the value of the dower interest in determining the amount of personal property that should be set apart under section 2. The language used in section 2, as to which this controversy arises, is as follows: "And in case the interest of a widow in the real estate of a deceased husband, in addition to her dower right, and together with said one hundred and fifty dollars, shall be of less value than one thousand dollars, then said appraisers shall set apart, for the use of the widow, or for the use of such widow or child and children, in the manner hereinbefore prescribed, personal property, which, together with said real estate, shall amount to one thousand dollars in value." This statute, like all others, should be read and interpreted according to the natural and most obvious import of the language employed, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation. People *ex rel.* Bockes v. Wemple, 52 *Hun* 414; Walker v. Harris, 20 Wend. 561; Ogden v. Sanders, 12 Wheat. 332; Matter of O'Neil, 91 *N. Y.* 516, 520. So read and interpreted, manifestly it was the legislative intent that, if the new and additional interest given to the widow in the real estate of her deceased husband by section 1, and the $150 exemption, should be less than $1,000, then the appraisers should set apart to the widow, in personal property, the difference between the sum of those two items and $1,000. The words "the interest of a widow in the real estate of a deceased husband, in addition

to her dower right," can mean nothing else than the "additional portion" referred to in the first section, which is the use, during life, of $1,000 worth of real estate, where the deceased left a descendant or descendants. The word "interest," as here used, had reference to the widow's interest in the real estate of her deceased husband, exclusive of her dower right or interest. This is so because the interest referred to is declared to be the interest the widow has "in addition to her dower right." Confessedly, she has no interest in the real estate of the husband, in addition to her dower right, except what is given to her by the first section. Assuming, then, that the interest of the widow in the real estate, mentioned in this statute, is simply the new or additional portion given by the first section, and exclusive of her dower right, is the $150 exemption to be added to it, in order to ascertain whether the same is less than $1,000? Following, as I contend, a description of this new interest given by section 1, are the significant words, "and together with said one hundred and fifty dollars, shall be of less value than one thousand," etc. These words, it seems to me, very clearly imply that the $150 shall be added to the value of the interest, and, if the sum shall be less than $1,000, additional personal property shall be set apart to the widow. The words "and together with" are words of addition. In the case before me the interest of the widow in the real estate of her deceased husband, in addition to her dower right, being the use during life of two thirds of the real estate the husband owned when he died, is $32.63. Suppose, then, instead of using the words "the interest of the

widow in the real estate of a deceased husband, in addition to her dower right," we substitute therefor what in this case means the same thing, then the statute would read, in its application to this case: "And in case the interest of the widow, in addition to her dower, to wit, $32.63, together with said $150, is less than $1,000, the additional personal property shall be set apart." So put, obviously the $150 is to be added to the widow's interest in the real estate, exclusive of her dower right. The interest of the widow in the real estate, in addition to her dower right, being $32.63, that sum with the $150 makes but $182.37, which is less than $1,000. Therefore I am of the opinion that the appraisers should set apart for the use of the widow personal property to the amount of $816.37. A decree may be entered in accordance with the views here expressed.

ROCKLAND COUNTY.—HON. GEORGE W. WEIANT, SURROGATE.—February, 1891.

MATTER OF HESDRA.

In the matter of the estate of EDWARD D. HESDRA, *deceased.*

The words in a will "After my lawful debts are paid, I give," etc., constitute such an express charge upon testator's real estate as will defeat an application for the disposition of such real estate for the payment of debts. Code Civ. Pro., § 2759, subd. 4.

MATTER OF HESDRA.

Where a will, after directing that testator's lawful debts be paid, and giving certain legacies, provides that "the real and personal estate whenever found shall be disposed of as deemed best by my executor"—this latter provision gives to the executor a valid power of sale for the purpose, among others, of the payment of the debts of testator.

In such case the words "shall be disposed of" are equivalent to "shall be sold," that being evidently under the terms of the will, the disposition contemplated by the testator.

The existence of an implied power of sale is, under section 2759, subd. 4, of the Code of Civil Procedure, as effectual as an express power, to prevent a decree for the disposition of real estate for the payment of debts.

APPLICATION for the disposition of the lands of Edward D. Hesdra for the payment of his debts.

CHARLES A. DUNHAM, *for the petitioning creditor.*

GARRET Y. SNIDER, *for the executor.*

JAMES HENDERSON, *for* PHEBE HENDERSON, *creditor.*

MYERS S. ISAACS, L. NAPOLEON LEVY, GEO. A. WYRE, ARTHUR S. TOMPKINS *and* H. C. DEWITT, *for various legatees.*

THE SURROGATE.—This proceeding is brought by Lucien B. Dunham, a creditor of Edward D. Hesdra, deceased, to have the lands of said decedent sold, mortgaged, or leased for the payment of the debts of the deceased. The petition was filed January 2, 1891; a citation was thereupon issued to the proper parties; upon the return of such citation and subsequently, devisees and legatees interposed and filed answers to such petition; thereafter proofs were taken on behalf of the petitioner and on February 6, 1891, the petitioner rested his case. Thereupon the contestants moved to dismiss the proceedings on, among other grounds, that the petitioner had not established as required by section 2759 of the Code of Civil Procedure, that the debts for the payment of which the de-

cree is sought are not expressly charged by the will of said deceased upon his real property, or if so charged that the remedies of the creditor, by virtue of that charge have been exhausted; that the property to be disposed of was not effectually devised, expressly charged with the payment of debts, and is not subject to a valid power of sale for the payment thereof; or if so devised or subject that it is not practicable to enforce the charge or to execute the power, and that the creditor has effectually relinquished the same; and that the personal property of the deceased which could have been applied to the payment of his debts has been so applied and that it is insufficient for the payment of the same.

It is this motion that I am now called upon to decide.

The only proof touching the matters set forth in the first two grounds for dismissal is found in the will of the deceased. That document was put in evidence and no proof whatever was adduced as to the remedies of the creditor having been exhausted, if any, or that it is not practicable to enforce the charge or to execute the power, if such there be, under said will, or that the creditor has effectually relinquish the same.

Such being the status of the proceeding my conclusion is that the dismissal must be granted.

Section 2759 of the Code provides that "A decree directing the disposition of real property, or of an interest in real property, can be made only where after due examination, the following facts have been established to the satisfaction of the Surrogate;" then follows in subdivisions three, four, and five of such

section the requirements above cited as the grounds for the motion to dismiss.

The will of the deceased provides, "First: After my lawful debts are paid I give," etc., to a number of legatees specific sums aggregating upwards of $40,000. He then ordered that his "wife's grave be cleared up, the lot properly fenced and a suitable stone erected to her memory the cost to be paid out of my estate, the bequests to be paid in proportion whenever there shall be in the hands of my executor fifteen thousand dollars; the real and personal estate whenever found shall be disposed of as deemed best by my executor; the rest and residue of my estate, if any there shall be, shall be equally divided between Hattie Hesdra, Amanda Tordoff, Edgar Tordoff and Mary Emma Tordoff."

The first point urged is that the words "After my lawful debts are paid I give," etc., are sufficient to constitute an express charge within the meaning of the statute upon the decedent's real property under subdivision three of section 2759 above cited. This under the authorities would seem to be so although I have some doubt about it. In the Matter of Fox, 52 *N. Y.* 530, it was held that the words "after payment of debts" constituted a charge of the debts upon the lands devised, citing Lupton v. Lupton, 2 *Johns. Ch.* 614. The same was held in Matter of Smith, 6 *Dem.* 45, in a proceeding similar to this, and the proceeding dismissed. So also, in Matter of Rosenfield, 5 *Dem.* 251, Reynolds v. Reynolds, 16 *N. Y.* 257, and cases there cited.

This point would not necessarily be fatal to the

proceeding had the petitioner established as provided in such subdivision three "that the remedies of the creditor by virtue of that charge have been exhausted." Of that, however, no proof was submitted and the matter stands as one where the express charge is established and the remedies of the creditor unexhausted. One of which remedies it would seem, considering the rights of the creditor without reference to any power of disposition under the will would be in equity. Matter of Fox, *supra*, 530–537. This objection therefore seems well taken.

But if it be assumed that there is no express charge of the debts upon the realty, I am of the opinion that the objections based upon subdivision four are well founded. As we have seen, the property sought to be disposed of is effectually devised, either expressly or impliedly charged with the payment of the debts of the testator. If then the same is subject to a valid power of sale for the payment thereof, then the petitioner has failed to establish what is required by this subdivision to entitle him to a decree, for as stated above, no proof has been adduced that "it is not practicable to enforce the charge or to execute the power and that the creditor has effectually relinquished the same."

Is this real property then subject to a valid power of sale under the will of the testator?

It was held in the Matter of Fox, *supra*, that a power in executors to sell lands will not be implied from the fact alone that the lands are charged with the payment of debts. An inspection of that case however shows that no power of disposition whatever

of the real estate was given by the will, and it is very clear that the court did not intend holding that where a power of disposition was given for the purpose of carrying out the provisions of the will, one of which is the payment of debts of the testator, that such power would not authorize a disposition to pay debts.

An examination of the provisions of the will in this matter it seems to me clearly discloses a purpose on the part of the testator to confer upon his executor the power to dispose of this property real and personal for the purpose of effectuating every provision of his will, including that of the payment of his debts. His property was quite all real estate, and the provisions of the will cannot be made effectual, except by a disposition of the real estate and a conversion of it into personalty. But aside from such a necessary construction in order to carry out his directions and bequests, the instrument as a whole shows the purpose of the testator to have his property disposed of to create a fund to enable his executor to comply with every provision of his will; the words "shall be disposed of" are equivalent as used by the testator to "shall be sold," that being most probably, in view of the terms of the will, the disposition that the testator contemplated.

Similar provisions in other wills as to powers of disposition have received a like instruction by the courts. Matter of Rosenfield, 5 *Dem.* 251; Matter of Davids, 5 *Dem.* 14; Matter of Smith, 6 *Dem.* 431.

In Coogan v. Ockershausen, 55 *Super* 286, it was held by the general term of the Superior Court of New York city that where a testator provided by his will

as follows: "I direct all my just debts and funeral expenses to be paid as soon as practicable after my decease:" all "the rest, residue and remainder of his estate" he devised to his executor in trust, etc., that the will by the legal effect of its provisions made the payment of the debts a charge upon the land, and that although the charge was an implied one, the executor being a devisee in trust had an implied power of sale for the purpose of paying the debts. The court further says: "That the will made the payment of the testator's debts a charge upon his real estate and to carry out the provisions of the will directing the payment of the testator's debts, the executor of the will had an implied power of sale for the purpose of paying the debts."

Chief Judge SEDGWICK says in his opinion, in speaking of the right of a creditor to maintain these proceedings: "But before the Surrogate can make a decree of sale he must find (§ 2759) that the property is not subject to a valid power of sale for the payment of the debts, with a limitation that will be noticed. The statute does not refer to an express power. If there be an actual and valid, although an implied power, the Surrogate cannot make the decree."

I am also inclined to such a construction of subdivision four. The two requirements seem to be separate and distinct that the property is not "effectually devised expressly charged with the payment of debts," and "is not subject to a valid power of sale for the payment thereof." It is not provided that this power shall be "express" but the charge.

But under this subdivision four of section 2759 as

we noticed above under subdivision three, there is a saving provision to the creditor, that such express charge or valid power of sale will not defeat the proceeding of the creditor if he establishes that, if the property be so devised or subject, it is not practicable to enforce the charge or to execute the power, and that the creditor has effectually relinquished the same.

This is the "limitation" above mentioned in the words quoted from the opinion of Mr. Justice SEDGWICK. This saving provision however has no application upon the proofs to this proceeding, as no claim is made that if there be such a charge or power of sale that it is not practicable to enforce the charge or to execute the power, or that the creditor has in any way relinquished the same, nor is there any proof thereof.

My conclusions thus reached are fatal to this proceeding. This renders it unnecessary for me to consider and determine the grounds for dismissal based upon the fifth subdivision of § 2759 as to the insufficiency of the personal estate to pay the debts. The will clearly contemplates a conversion of all the property real and personal of the testator into one general fund to enable the executor to carry out its provisions and his purposes. Power v. Cassidy, 79 *N. Y.* 602. And while I am inclined to the opinion that the words "personal property," as used in the statute in this subdivision signifies personal property, generally known as such and as distinguished from realty or the proceeds thereof, still for the practical purposes of the payment of the debts of the decedent it seems to me that it resolves itself into simply a matter of

methods of reaching and applying the proceeds of the realty. Glacius v. Fogel, 88 *N. Y.* 434.

The proceeding is accordingly dismissed and a decree may be presented for signature so disposing of the same.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—March, 1891.

MATTER OF BYRNES.

In the matter of the estate of MATTHEW BYRNES, *deceased.*

Where under the provisions of a will the executors are also created testamentary trustees to pay certain rents and profits of land to certain legatees, an application by such legatees to compel a payment of income to them must be made under sections 2804 and 2805 of the Code of Civil Procedure, relating to compelling the payment of a debt or legacy by testamentary trustees, and not under sections 2717 *et seq.* of that Code, which perscribe the method of enforcement of claims of legatees or creditors against executors or administrators.

APPLICATION by Matthew Byrnes, a legatee under the will of Matthew Byrnes, deceased, to compel a payment to him, on account of the income payable to me under the will of decedent.

HESS, TOWNSEND & MCCLELLAND, *for* MATTHEW BYRNES, *Pet'r.*

THE SURROGATE.—This is an application by one of the beneficiaries under the will of the decedent for a

payment on account of income. Letters were issued April 1, 1890. The petitioner is entitled, under the fifth clause of the will, to one sixth of the income of the residue, payable in January and July of each year. He alleges that the executors have $12,000 of accrued income, and refuse to pay. The respondents filed no answer, but it was claimed by them on the argument that, inasmuch as a year had not elapsed, the petitioner must bring himself within section 2719 of the Code, which provides for the only case where a legacy or other pecuniary interest under a will can be paid by executors before the expiration of a year, viz., for support and maintenance; and that, the petition being silent in this regard, the motion should be dismissed. Counsel for the petitioner undoubtedly thought that the appropriate proceeding to procure the relief sought was under section 2717 *et seq.*, and, in the brief filed, the application is stated to be made under that section. The citation runs against the respondents only as executors. It seems to me plain that the fifth clause of the will constituted the respondents testamentary trustees of the portion of the residue disposed of thereby, and it is under this clause that the petitioner is entitled to the income to secure the payment of which this application is brought. This being so, his application must be brought under sections 2804 and 2805 of the Code, and the respondents should have been cited in their capacity as testamentary trustees. To constitute a testamentary trustee, it is necessary that some express trust be created by the will. Merely calling an executor a trustee does not make him such. Matter of Hawley, 104 *N. Y.* 250. By the clause of the will

in question the testator devised to his executors the residue of his property in trust during the lifetime of two of his great-grandchildren, for whose benefit a provision was made during their lives. The trustees were authorized to mortgage or lease the real estate, to receive the rents, issues, and profits, and to pay the same to the beneficiaries in the proportions provided. It seems to me clear that this constituted an express trust, under the Revised Statutes, the essential requisite to the creation of a testamentary trustee. The respondents not having been cited in this capacity, the application must be dismissed.

MADISON COUNTY.—HON. ALFRED D. KENNEDY, SURROGATE.—March, 1891.

MATTER OF HOUSE.

In the matter of the estate of OTIS N. HOUSE, *deceased.*

Decedent, a resident of the state of New York, intermarried therein with one Mary F. also a resident thereof. Thereafter decedent left the state, and after remaining over a year in Ohio, commenced an action for divorce against his wife for a cause which was sufficient under the laws of Ohio. The wife was not in Ohio at the time of the commencement of the action, nor was she ever a resident of that state. She did not appear, nor was she served personally or by mail in that action. A commission was issued therein to take testimony in this state. The wife was notified of the time and place of the hearing, and admitted in writing due personal service of a copy of the notice and taking of the depositions, and gave a consent that depositions might be taken and witnesses summoned in the cause, without further notice to her.

After his divorce, decedent intermarried in Michigan, and left his second

wife him surviving: *Held*, that the decree of divorce was absolutely void as to his wife, Mary F., and that upon his death she was entitled to letters of administration upon his estate.

APPLICATION for letters of administration upon the estate of Otis A. House, deceased.

H. D. LUCE, *for petitioner*, MARY F. HOUSE

E. F. HASKILL, *for petitioner*, ANNA E. HOUSE.

THE SURROGATE.—Application is made to the Surrogate by Mary F. House and Anna E. House to be appointed administratrix of the estate of Otis A. House, each claiming to be his legal widow and entitled to be thus appointed. The facts out of which the controversy arises are as follows: The deceased and Mary F. House intermarried in Otsego county, N. Y., March 18, 1874, and thenceforward lived together as husband and wife in that county until March, 1876, when they separated. Subsequently Mr. House went to Ohio, where, after remaining more than a year, he commenced an action for divorce against his wife, who was then, and is now, and always has been, a resident of the state of New York. There was no secrecy on the part of House in procuring the divorce, for the certified copies of the records of the court show that a commissioner was duly appointed to take testimony in Otsego county as to his wife having abandoned him. Upon the execution of the commission, Mrs. House was notified of the time and place of hearing, and gave the following admission of the service of such notice: "I hereby admit due personal service of a copy of the within notice, and consent that depositions may be taken

and witnesses summoned in this cause without further notice to me. Richfield, January 10, 1883. MARY F. HOUSE." Four witnesses were sworn, and testified to the refusal of Mrs. House to live with her husband, and upon the evidence thus obtained the divorce was granted. No question is raised but that the evidence was sufficient to justify the court in granting a decree of divorce under the laws of Ohio, and it is admitted that the divorce obtained by said House from his wife on the 8th day of March, 1883, for wilfully abandoning him, was granted in compliance with the laws of that state. It was also conceded that Mary F. House was not in the state of Ohio at the time the action was commenced against her, nor has she ever at any time been a resident of or within that state, and the record shows that she was never served with any process in the action, either personally or by mail, either in the state of Ohio or elsewhere. The action was commenced by the publication of a notice of the filing of a petition for a divorce in the Court of Common Pleas of Lucas county, which notice was published for seven weeks in a newspaper published in Toledo, in that state, and the record shows that the defendant never appeared in said action either in person or by attorney.

After the decree of divorce was obtained, and on the 29th day of March, 1883, the said House and Anna E. House intermarried at Erie, Monroe county, state of Michigan, and have since lived together as husband and wife. Soon after this last marriage the deceased and Anna E. removed to the village of Oneida, N. Y., and lived there until his death at that place on

the 23d day of December, 1890. It is admitted that said last marriage was solemnized pursuant to the laws of the state of Michigan, and was a valid marriage under the laws of that state. The said House left no property save the usual household furniture necessary for himself and alleged wife, but, having been accidentally killed on the railroad at Oneida, it is supposed his legal representatives have a valid claim against the railroad company for a large sum, and hence arises the contest over the appointment of an administratrix for his estate. Upon the above state of facts we must hold that Mary F. House is entitled to be appointed administratrix, notwithstanding the validity of the divorce elsewhere than in the state of New York.

The right of Anna E. House to administer upon the estate of the deceased does not depend upon the regularity of the Ohio divorce in that state, or the legality of the Michigan marriage, but upon the validity of said divorce in the state of New York; for, if invalid here, she has no right under it which can be enforced in this state against Mary F. House. That said divorce is absolutely void in this state is apparent from the fact that at no time has the said Mary F. House been a resident of, or been in the state of Ohio, but has lived and been a resident of this state; that no process in said action or notice of the same was ever served upon her in Ohio or in this state; and that she never appeared or authorized any one to appear for her in said action or proceeding. Under such circumstances, the Ohio court never had any jurisdiction of the person of Mary F. House, and could not grant a judgment against her which would be valid in

this state, because, in matrimonial actions, the judgment of a court of another state has no binding effect here, unless it had jurisdiction of the subject-matter, and of each of the parties thereto; and this want of jurisdiction may always be interposed against such a divorce in this state when it is sought to be enforced, or when any benefit is claimed for it; and hence, when Anna E. House seeks to avail herself of this Ohio divorce, asserting its validity in the courts of this state, and claiming by reason of it and of her marriage to the deceased that she is the legal widow of Otis A. House, and therefore entitled to be appointed his administratrix, Mary F. House has the right to contest the claim and maintain her rights as widow upon the ground that, as to her, the Ohio judgment of divorce is a nullity in this state. When Otis A. and Mary F. House intermarried in this state, being citizens thereof at the time, the law invested his wife with certain legal rights, and among them was the right to administer upon her husband's estate, if she survived him, and this right could not be judicially or otherwise taken from her, either by the statutes or courts of another state, so long as she continued to be his wife, and remained a resident of the state of New York.

A court in Ohio cannot extend its process or its jurisdiction beyond the territorial limits of the state in which it exists, so as to subject the person or the property of the citizens of this state to its decrees, and it is the duty of this state and of its courts to protect the person and property of its citizens against the enforcement of such judgments whenever their validity is claimed within its boundaries or any attempt is

made to enforce them. It is for this state to determine who shall administer upon the estates of its intestate citizens, and among whom their property shall be distributed, and not for the courts of other states. Our laws cannot thus be repealed and modified. Our courts have always maintained that a citizen of this state could not be charged *in personam* by the adjudication of the courts of another state, unless he was personally served with process within the jurisdiction of such courts, or voluntarily submitted in some legal manner to their authority; and, so long as the laws of this state are thus declared, divorces obtained like the one in this proceeding must be held to be absolutely void. There is no injustice done to any one in holding such judgments to be a nullity, because parties thus obtained divorces for the purpose of remarrying, and then returning to this state to live, assume the risk of their illegality. Such divorces are only a cover for a domestic life unrecognized by our laws, and tolerated only by public sentiment or public indifference. If the husbands or wives of such marriages desire to enjoy the financial results which may be acquired by their industry or otherwise, they should remain in those states where such divorces and marriages are recognized as valid, or else, by will or otherwise, dispose of their property in such manner as to confer its benefits upon the survivor.

It appearing, therefore, from the facts in this proceeding, that the alleged divorce of Otis A. House from his wife is illegal and void in the state of New York as against her, and that she is now the lawful widow of the deceased, an order will be entered ap-

pointing Mary F. House administratrix of the estate of Otis A. House, deceased.

ALLEGANY COUNTY.—HON. S. MCARTHUR NORTON, SURROGATE.—April, 1891.

MATTER OF WITTER.

In the matter of the estate of MARY P. WITTER, *deceased.*

Testatrix, a married woman, executed a will in this state. Thereafter and while still a resident of this state, she had two children. Afterwards removing with her husband and children to the state of Rhode Island, she there had another child and died a resident of that state. Her entire property consisted of personal property in this state. The laws of both New York (4 Rev. Stat., 8th ed., p. 2549, § 49) and those of Rhode Island (Pub. St., title 24, chap. 182, § 12) provide that a child born after the making of a will in which no provision is made for him, shall have the same interest in the estate of his parent as if the parent had died intestate. Testatrix at her death left a husband who under both the laws of New York and Rhode Island would in case of intestacy have taken the whole of the personal estate. Testatrix left however a will disposing of all her personal property: *Held*, that in such case the children of testatrix would have taken nothing had their mother died intestate, and therefore were entitled to no part of the bequeathed estate, and that such estate should be distributed in accordance with the terms of the will.

PROCEEDINGS for the distribution of the personal estate of Mary P. Witter, deceased.

Decedent, a married woman, had resided with her husband in Allegany county in this state, and there

executed her last will and testament. Thereafter and while still a resident of Allegany county, she had two children, and having removed with her husband and children to the state of Rhode Island she there had another child, and thereafter died while a resident of that state. Her property which was all personal, consisted of bonds secured by mortgages upon real estate in Allegany county. The legacies provided for by the will and the debts having been paid, the surplus was claimed by the residuary legatee and also by the children of testatrix.

L. C. VAN FLEET, *for executrix.*

JOSEPH F. RICE, *for special guardian.*

THE SURROGATE.—Section 49 of the Statute of Wills of the state of New York provides, whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child so after born, unprovided for by any settlement, and neither provided for nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent's real and personal estate as would have descended or been distributed to such child if such parent had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to and out of the parts devised and bequeathed to them by such will. The statutes of the state of Rhode Island, title 24, chap. 182, § 12, provide as follows: "Whenever any child shall be born after the execution of his father's or mother's will without hav-

ing any provision made for him in such will, he shall have a right and interest in the estate of his father or mother in like manner as if the father or mother had died intestate, and the same shall be assigned to him accordingly." Title 24, chap. 184, § 7, of the Statutes of Rhode Island provides: "The husband shall be entitled to the administration of the personal estate of his wife, in case of her intestacy, and shall not be compelled to distribute the same among the next of kin, but shall have and retain the surplus thereof after the payment of her debts for his own use." Title 20, chap. 166, § 13, of the Statutes of that state provide that "any married woman of sane mind, and of twenty-one years of age, may dispose of her real estate, or any portion of the same, and, being of the age of eighteen years, may dispose of her personal estate, or any portion of the same, by a last will and testament, executed in the manner in which other wills are required to be executed for disposition of like property." By section 14 of the same chapter, it appears that the right of the husband in the real estate of the wife as tenant by the curtesy, and his right to administer without account upon her personal estate not disposed of by her last will and testament, shall not be impaired by the provisions of this chapter.

The succession to the personal property of an intestate is governed exclusively by the law of the domicile of the intestate at the time of his death. Code Civil Proc., § 2694; Moultrie v. Hunt, 23 *N. Y.* 403; Parsons v. Lyman, 20 *N. Y.* 103; Despard v. Churchill, 53 *N. Y.* 192. Section 2612 of the Code of Civil Procedure of New York provides as follows: The right to

have a will admitted to probate, the validity of the execution thereof, or the validity or construction of any provision contained therein is not affected by the change of the testator's residence made since the execution of the will; and section 2694, that, except where special provision is otherwise made by law, the validity and effect of a testamentary disposition of personal property situate within the state, and the ownership and disposition of such property, where it is not disposed of by will, are regulated by the laws of the state or country of which the decedent was a resident at the time of his death. Now, giving to section 2612 full force, without modifying its meaning by the terms of section 2694, it must mean that the validity of the instrument and its provisions—that is, the right of the testator to do what he attempted to do, and in the manner in which he attempted to do it—must be tested by the law of the place where he was domiciled at the time he made the will. And the construction of its provisions, the intended meaning of the words of the testator, must be sought and discovered under the light of the law of the place where he is domiciled at the time he uses them. But when the validity of the instrument and its provisions have been tested by the law of the place where it was made, then the incidental effects of the instrument must be decided by the law of the place where it takes effect. It must be held that section 2612, 2694, leave the effect of the instrument to be decided by the law of the testator's domicile at the time of his death. But in deciding the question here involved it is not necessary to construe these sections; for the right to have

the will admitted to probate, the validity of the execution thereof, or the validity or construction of any provision contained therein is not in question. The instrument and all its provisions are valid under the laws of both states, and there is no question as to any provision contained therein under the laws of either state. It cannot even be said that the effect of the instrument is in question; for the laws of both states provide, practically, that the instrument shall be of no effect so far as it relates to post-testamentary children. The statutes of both states leave them in precisely the same position as they would have been had no will been made; the only difference being that the laws of this state allow the estate to pass to the legatees, and then give the children a right of action against them for their interest in the same, while the laws of the state of Rhode Island seem to require that their portion be distributed to them upon the final settlement of the estate. The laws of both states provide in plain terms that post-testamentary children shall have the same interest that they would have had if the parent had died intestate; no more, and no less. What that interest may be depends entirely on circumstance: (1) The laws governing the succession to her property; (2) the condition of her property at the time of her death; (3) her domestic relations at the time of her death. If she had died domiciled in the state of New York, leaving personal property, the children would have taken two thirds of the same, whether there was or was not a will. If she had died in either state, leaving a husband and real estate situated within the state, the children would have taken

the whole of her real estate, subject to her husband's right of curtesy, whether there was or was not a will. But the facts are: (1) She died domiciled in the state of Rhode Island; (2) she left nothing but personal property; (3) she did leave a husband, who would have taken the whole of the wife's personal estate in case of intestacy, and the children take nothing, whether there is or is not a will. They would have taken nothing if their mother had died intestate; therefore they take nothing, and the whole estate must be distributed according to the terms of the will. It was not intended by the statutes of either state to give post-testamentary children an interest in the parent's estate by virtue of the will, but to give them an interest therein in spite of the will, and the same as if it had not been made. *In re* Braithwaite, 19 *Abb. N. C.* 113, is in point. It is in the discretion of the Surrogate whether he will remit the assets to the jurisdiction of the domicile, or distribute them according to the law of the domicile, depending upon the circumstances of each case. But where there are no debts in either state, and the convenience of parties interested will be better served, the Surrogate will make distribution, keeping in view the laws of distribution at the place of the domicile. *In re* Braithwaite, above cited: Matter of Hughes, 95 *N. Y.* 55; Parsons v. Lyman, 20 *N. Y.* 103; Despard v. Churchill, 53 *N. Y.* 192. In this case the assets should be distributed according to the terms of the will, and the executrix and residuary legatee allowed to retain the residue of the same, and a decree to that effect will be entered.

RENSSELAER COUNTY.—HON. JAMES LANSING, SURROGATE.—April, 1891.

MATTER OF PERRY.

In the matter of the estate of AARON PERRY, *deceased.*

A proceeding to compel an administrator to account is barred after six years from the time when, under section 2724 of the Code of Civil Procedure,—namely, one year after the grant of letters of administration, an administrator may be compelled to account.

Section 1819 of the Code of Civil Procedure, providing that an "action" may be maintained for a legacy or distributive share against an executor or administrator who refuses to pay the same on demand, after the expiration of one year from the granting of letters testamentary or letters of administration, and providing that "for the purpose of computing the time within which such an action must be commenced, the cause of action is deemed to accrue when the executor's or administrator's account is judicially settled and not before," applies to actions only and not to special proceedings, and therefore does not give to a legatee the right to cite the executor or administrator to account in the Surrogate's Court, after the Statute of Limitations has run against the legacy.

In a proceeding to compel an accounting, an administrator does not waive the defence of the Statute of Limitations which he has set up in his answer, by voluntarily filing an account, but such defence may be set up at any time before all the evidence is in.

PROCEEDINGS by Charles H. Hitchcock as administrator of Ella V. Hitchcock, deceased, to compel an accounting by Maria V. Perry, as executrix of Aaron Perry, deceased. Petitioner alleged that his intestate was at the time of her death entitled to a distributive share in the estate of her father, Aaron Perry, deceased.

CHARLES E. PATTERSON *and* KING & ASHLEY, *for* CHARLES H. HITCHCOCK, *petitioner.*

MATTER OF PERRY.

McCLELLAN & McCLELLAN, *for* MARIA V. PERRY, *administratrix.*

THE SURROGATE.—The principal question in this case is whether the Statute of Limitation has run upon the right of the next of kin of said deceased to require the administratrix herein to account and pay the distributive share, if any, alleged to be due the petitioner's intestate as such next of kin. Up to the enactment of the Code, and even prior to the Revised Statutes, (Borst v. Corey, 15 *N. Y.* 505–509,) it was settled that the Statute of Limitations began to run as soon as the right to compel an accounting had accrued. This was originally fixed at one year, and subsequently eighteen months, from the time letters were issued upon the estate of the deceased. Clark v. Ford, 1 *Abb. Dec.* 359; McCartee v. Camel, 1 *Barb. Ch.* 455; Clock v. Chadeagne, 10 *Hun* 97; Smith v. Remington, 42 *Barb.* 75; Dayton on Surrogate, 515. This was not by reason of any statute upon the subject, but because originally by rule of equity; and subsequently, by statute, it was provided that, where there was a concurrent jurisdiction at law and in equity and in the Surrogate's Court (when the same jurisdiction was extended to it) for the collection of debts, legacies, and distributive shares, the statutory limitations applicable in such actions at law govern the institution of like proceedings in equity and in the Surrogate's Court. 2 Rev. Stat. 301, § 49; Id. 114, § 9; Id. 116, § 18; Kane v. Bloodgood, 7 *Johns. Ch.* 90, 114; McCartee v. Camel, *supra.* Although the relation of an administrator to a distributee is quite analogous to the relation of trustee and *cestui que trust,* in which case

no lapse of time will bar the claim of the *cestui que trust*, (Murray v. Coster, 20 *Johns.* 576,) yet it differs in this: that it is not a direct, express, or continuing trust, which is solely cognizable in a court of equity. Indeed, the relation is more akin to that of bailment, where the property is held "under a contract, obligation, or liability, express or implied." But, whatever may be the distinction between the relation of an administrator to the next of kin and of a trustee to his *cestui que trust*, it is conclusively settled by repeated adjudications that proceedings for an accounting against an administrator in the Surrogate's Court are not exempt from the operation of the Statute of Limitations.

But the important question which remains is as to the effect of the enactment of the Code of Civil Procedure upon the Statute of Limitations relative to a compulsory accounting in the Surrogate's Court. There has not been entire uniformity of decision by the courts upon that subject since the adoption of the Code of Civil Procedure. Section 1819 is relied upon to sustain the position that a new rule of limitation has been established by the Code of Civil Procedure, not in direct terms, but by necessary implication upon the subject of an accounting in Surrogates' Courts. This section is a part of title 3, c. 15, Code Civil Proc. The title is declared to refer to "actions relating to the estate of a decedent." And the first article of the title in which section 1819 occurs is stated to be "in regard to an action by or against an administrator." It will be observed that there is nothing said about special proceedings in this section, nor is it by any provision made

applicable to them. The whole title relates to actions only, and the section itself provides for maintaining "such action" under certain conditions. The very terms of the section seem to us to preclude the construction that it was intended to embrace special proceedings. The provision of that section in substance is that the Statute of Limitations, in respect to actions for the recovery of legacies and distributive shares, shall only begin to run when the executor's or administrator's account is judicially settled. It would seem that the effect of construing this section as applicable to special proceedings in Surrogates' Courts would be not to furnish uniform rule of limitations applicable alike to actions and special proceedings, but would result in a relegation of such proceedings to the rule of limitation, if any arising from presumption of payment, viz.: That, after the expiration of twenty years from the time when an action might have been brought or proceedings instituted, the court will presume payment. We do not think the legislature intended any such result. But we are not left to reason alone as to the proper construction of this section, for the Supreme Court at General Term, (*In re* Van Dyke, 44 *Hun* 394,) in a well considered opinion by Mr. Justice DANIELS, has decided that this section (1819) applies only to actions. This decision has been followed by numerous adjudications in the Surrogate's Court. Matter of Dunham, (COFFIN, S., 1889,) 1 *Conn. Surr. Rep.* 323; Matter of Clayton, (RANSOM, S.,) Id. 444: Matter of Nichols, (POTTER, S.,) 2 *Conn. Surr. Rep.* 156. Again, the distinction between civil actions and special proceedings is recognized throughout the Code, and especially by

section 414 of the Code of Civil Procedure, which provided "that the provision of this chapter (entitled 'Limitations for the time of enforcing a civil remedy') apply and constitute the only rule of limitations applicable to a civil action or a special proceeding," except where otherwise expressly provided. It is manifest, therefore, that there was no intention on the part of the legislature to have section 1819 apply to special proceedings, for it is not so expressly provided, or necessarily implied therein. We must look elsewhere, therefore, for the rule of limitation applicable to the institution of such proceedings in the Surrogate's Court. Section 414 requires the word "action" to be construed, when it is necessary to do so, as including a special proceeding. And the same section also declares that chapter 4 contains the "only limitation applicable to special proceedings." As the proceeding in this case before the Surrogate is concededly a special proceeding, we now turn to section 382, ch. 4, subd. 1, and find, in effect, the rule that proceedings to enforce an account should be commenced within six years after the right to require it has accrued; for this is a proceeding to "enforce an obligation or liability not arising from a judgment or sealed instrument." Either this or subdivision 2 of the same section, relating to a "liability created by statute," must include the case of a proceeding against an administrator for an accounting in the Surrogate's Court. Then, turning to section 2724 of the Code, we find that an administrator may be required to submit to the judicial settlement of his accounts after the expiration of one year from the time the letters were issued to him. The obli-

gation to account, therefore, accrues at that time; and, under the provision of section 382, above referred to, the right to require an accounting will be barred after the expiration of six years from the time when the accounting may be ordered according to section 2724. It follows, therefore, that the statute had run upon the right to compel an accounting by the administratrix before the petition herein was filed. Although this construction of these several sections (382, 414, and 1819) will result in producing different periods of limitation—one in law and in equity, and another in the Surrogate's Court—for the enforcement of the same obligation, (which we are not quite sure the legislature contemplated,) still it may be stated that these sections are not inharmonious; for section 1819 provides that the action mentioned in it should not be commenced until an accounting had taken place; while sections 382 and 414 provide for the time within which the accounting must be had in order to avoid the effects of a statutory limitation upon the accounting. We have carefully examined all the cases cited, and the provisions of the present Code referred to by the learned counsel for the petitioner in his able brief in support of his contention; and, while it must be conceded that the course of legislation prior to the present Code indicated a design upon the part of the legislature of having the same limitation apply to an action and a special proceeding, yet, notwithstanding the legislature has by direct provision in the present Code changed and greatly extended the period of limitation for the institution of actions of the character herein considered, we cannot agree that there is any provision of the

Code which directly or by necessary implication warrants the conclusion that the period of limitation within which to institute proceedings for the collection of legacies or distributive shares in the Surrogates' Courts has been extended, or that the former law upon the subject has been in any manner changed.

Another question suggested for consideration is that of waiver. In this case the administratrix voluntarily filed an account; but at the same time by her answer she set up the Statute of Limitations. The question of waiver, therefore, becomes merged in the question as to at what stage of the proceeding the statute of limitations may be interposed. It has been repeatedly held that it may be set up at any time before all the evidence is in, so that the claimant may have an opportunity to contest the same by proofs which may relieve him from the operation of the statute. Clock v. Chadeagne, *supra;* Smith v. Remington, *supra;* McCartee v. Camel, *supra; In re* Clayton, *supra.*

The remaining question involves the character of the party who institutes the proceedings. It is suggested that the 20-years limitation (section 381) should apply, if at all, to a proceeding where the same was instituted by a surety upon the bond of the administratrix, or at least that the right given a surety under section 2726, Code Civil Proc., to require an accounting, is not barred by any other statute or rule. If this proceeding was based upon the bond upon which the petitioner's intestate, Ella V. Hitchcock, was surety, assuming it to be in the usual form, this claim would be plausible, as the bond doubtless provides that an administratrix should obey the decree of the Surrogate; and he is authorized

to require her to account. But the duty to account does not rest on that obligation. It exists independently of any contract liability. The surety will doubtless rest under liability in a proper case for the debts or defaults of his administrator for 20 years. Still it does not follow that distributees or legatees may avail themselves of this extended liability of the principal, (the administratrix,) or her sureties so as to maintain those proceedings to account in the Surrogate's Court after the expiration of six years; nor can the surety (at least before being charged) have any greater right or longer time within which to compel an accounting in that court than any other creditor. Matter of Nicholls, *supra*. In the latter case this very question—the right of a surety to compel an accounting—was before the court, and decided adversely to the petitioner's contention. The petition is dismissed, therefore, unless the petitioner shall desire to offer evidence of facts which will avoid the Statute of Limitations applicable to this proceeding, in which case the hearing may proceed upon that issue. Matter of Underhill, 1 *Conn. Surr. Rep.* 541.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—May, 1891.

MATTER OF SISTARE.

In the matter of the estate of GEORGE K. SISTARE, *deceased.*

To an application of a receiver of the property of a judgment debtor appointed in supplementary proceedings to compel an accounting by a testamentary trustee under a will by which the judgment debtor has in the estate an assignable interest, a complete answer is furnished by the facts that prior to the inception of the supplementary proceedings the judgment debtor had assigned his interest in the estate, that no order in the supplementary proceedings was ever served on the judgment debtor and that he was never examined in said proceedings.

The validity of an assignment of the interest of a beneficiary in the estate of a decedent cannot be attacked in the Surrogate's Court.

APPLICATION by Job E. Hedges, a receiver appointed in proceedings supplementary to execution, of the property of George K. Sistare, a judgment debtor, to compel an accounting by William H. M. Sistare, trustee under the will of George K. Sistare, deceased. The judgment debtor was a beneficiary under this will.

The facts appear in the opinion of the Surrogate.

WILLIAM ERDMAN, *for* JOB E. HEDGES, *receiver.*

HENRY S. BENNETT, *for* WILLIAM H. M. SISTARE, *trustee.*

THE SURROGATE.—A judgment was recovered against George K. Sistare, a beneficiary under the will of decedent, on or about April 3, 1890, in the

Superior Court of the city of New York. The judgment roll was filed in the office of the clerk of that court on the 3d day of April, 1890, and a transcript thereof was filed, and the judgment duly docketed in the county clerk's office on April 3, 1890. Thereafter an execution on said judgment against the property of the judgment debtor was, on April 3, 1890, duly issued to the sheriff of the city and county of New York, and was returned wholly unsatisfied, and the judgment remains wholly unpaid. Thereafter an order was duly made and entered for the examination of William H. M. Sistare as the third person in the supplementary proceedings duly instituted against the judgment debtor, and such proceedings were had that a receiver of all the property of the judgment debtor was appointed by an order dated June 18, 1890. The receiver seeks to compel an accounting of the testamentary trustee under the will of the decedent. The answer to the application is that on the 29th day of April, 1890, George K. Sistare, the judgment debtor, by an instrument duly made, executed, and delivered, and for value, assigned all of his interest in the estate of decedent, and that the said judgment debtor had no interest in the estate at the time of the proceeding which resulted in the appointment of a receiver. It is further alleged that no order in the supplementary proceeding upon said judgment was ever served upon the judgment debtor, and that he was never examined under such order. As a further defence the testamentary trustee alleges that not until the month of June, 1890, was an order made for his examination as the third person

in the supplementary proceedings. Section 2468, Code Civil Proc., provides that the property of the judgment debtor is vested in the receiver, who has duly qualified, from the time of filing the order appointing him; . . . . and that his title to personal property only extends back by relation for the benefit of the judgment creditor in the following cases, (section 2469:) (1) Where an order requiring the judgment debtor to attend and be examined, or a warrant requiring the sheriff to arrest him and bring him before the judge, has been served before the appointment of the receiver or the extension of the receivership, the receiver's title extends back so as to include the personal property of the judgment debtor at the time of the service of the order or warrant. (2) Where an order or warrant has not been served as specified in the foregoing subdivision, but an order has been made requiring a person to attend and be examined concerning property belonging, or a debt due, to the judgment debtor, the receiver's title extends to the personal property belonging to the judgment debtor which was in the hands or under the control of the person or corporation thus required to attend at the time of the service of the order, and to a debt then due to him from that person or corporation. (3) In every other case, where notice of the application for the appointment of the receiver was given to the judgment debtor, the receiver's title extends to the personal property of the judgment debtor, at the time when the notice was served, either personally or by complying with the requirements of an order prescribing a substitute for

personal service. The answer of the testamentary trustee is a complete defence to the application. From an examination of the will it appears that the judgment debtor's interest thereunder was not inalienable, but assignable. The receiver's title vested at the time the order was made appointing him, viz., June 18, 1890, unless the proceeding is brought within the exceptions provided for by section 2469. It is alleged and not denied that no order requiring the judgment debtor to attend and be examined had ever been served upon him, and the order requiring the third person to attend and be examined was not served until May, 1890, being a period subsequent to the date of the alleged assignment. The validity of the assignment cannot be attacked in this court; Matter of Palmer, 15 *N. Y. Supp.* 710 n.; Matter of Wagner's Estate, 119 *N. Y.* 28, 36, and as long as it exists is an effectual bar to any proceedings of the petitioner to reach the interest in the estate that belonged to the assignor prior to the alleged assignment.

RENSSELAER COUNTY.—HON. JAMES LANSING, Surrogate.—June, 1891.

MATTER OF VEDDER.

In the matter of the judicial settlement of the account of DANIEL D. BUCKLIN *and* OTIS G. CLARK, *executors of and trustees under the will of* NICHOLAS S. VEDDER, *deceased.*

Where a parent gives a legacy to a minor child and no other provision for its support is found in the will, the legacy presumptively draws interest from the death of the testator, but the absence of such provision creates a presumption only, which may be overthrown by evidence in the will itself of a contrary intention, or the presumption may be repelled by evidence extrinsic to the will that the infant had other means of support.

The testator by his will gave to his wife for life the income and profit of his estate during her life, and upon her death disposed of the whole estate. Among the legacies was one of eight thousand dollars to a minor whom he called his adopted daughter. This child had been indentured in early childhood by a charitable institution to testator and his wife, and by the instrument of indenture testator and his wife agreed to receive the apprentice as an adopted child, to be maintained, educated, clothed and treated as far as practicable by them as if she were in fact their child. The child was treated by them as their own child, and on testator's death, continued to live with, and to be supported by testator's widow. *Held*, that the legacy to the child did not draw interest from the death of testator.

The increase from natural causes in the value of real and personal property of an estate held by executors as an investment, does not constitute profits, and therefore does not go to a life tenant to whom are given the "income and profits" of such estate during life, but such increase becomes principal and goes to the remainder-men.

Semble, that increase in the value of securities held by an estate of a decedent does not become "profits," and payable to the person who by the terms of the will is entitled to "profits," until the actual sale of the securities and the receipt of the increased value thereof.

The executors and trustees of the will of testator brought an action in the

Supreme Court to obtain a construction thereof. They were authorized by the will to sell in their discretion the real estate and to convert it into money. All legacies were payable on the death of testator's widow who had a life estate in the entire property. In this action the questions raised by executors and trustees and of which construction was sought were: the time of payment of the legacies, and whether certain legacies to certain institutions were void. All parties in interest, including the heirs, were duly made parties to this action. The court held that the legacies to the institution were void, and also that by virtue of the power of sale given to the executors and trustees the whole estate left by testator became personalty and must be distributed as such, and that as to the void legacies the testator died intestate, and that such excess must be divided among the next of kin of testator. *Held*, that it was within the proper scope of this action to determine what disposition should be made of the estate upon the death of the life tenant, and that the decision of the court that the entire estate was personalty and distributable as such, was binding upon all parties to the action, including the heirs, they not having appealed.

JUDICIAL settlement of the account of Daniel D. Bucklin and Otis G. Clark, executors of and trustees under the will of Nicholas N. Vedder, deceased.

Nicholas S. Vedder died in 1879, leaving a will, which was duly admitted to probate. He left him surviving a widow, Nancy A. Vedder, but no children or descendants. Ida Angell, a child of about nine years of age, was a member of his family at the time of his decease, and had been such for about six years. The testator and his wife had procured her from an institution in New York, known as the "American Female Guardian Society," in 1875. The child was indentured to them by the society an indenture in writing, and they assumed therein certain duties and obligations; among others, "to receive said apprentice as an adopted child, to reside in the family of the party of the second part, and to be maintained, clothed, educated, and treated, as far as practicable,

by them, with like care and kindness as if she was in fact the child of the party of the second part." The testator during his lifetime, and his wife after his decease, faithfully observed their agreement in their treatment of said Ida, and the said testator in his will terms her his "adopted daughter."

The provisions of the will, so far as they are necessary to be considered, are as follows: "*Item First.* I give and bequeath unto my wife, Nancy A. Vedder, all my household furniture, useful and ornamental, pictures, plate, and wearing apparel. *Second.* I give and bequeath unto my said wife, Nancy A. Vedder, the income and profit of all my other estate, both real and personal, of which I shall die seised or possessed, for and during her natural life." General legacies to the amount of $27,000 are provided for in the will, including the two legacies for which the legacy to Ida A. Vedder, of $8,000, provided for in the codicil, executed not long after assuming the care of said Ida, is a substitute. The codicil, dated July 25, 1875, provides as follows: "I revoke and cancel the bequest contained in the fourth item of said will, of $5,000, to my wife's sister, Fanny A. Mann; and [Martha Mann and Alvanda Homing, mentioned in the ninth item of said will, being dead] I revoke and cancel the bequest [$3,000] and benefit to and for Phœbe Mann, therein provided, in case of the death of said Martha Mann; and in place thereof I give and bequeath the sum of $8,000, being the sum of said former bequests, to my adopted daughter, Ida A. Vedder." The eleventh and last item of the will provided as follows: "Of the remainder of my estate

I give, devise, and bequeath one half unto the Troy Orphan Asylum of the city of Troy, N. Y., and the other one half unto the trustees of the Troy Annual Conference for the uses and purposes specified in the third section in their act of incorporation, passed March 30, 1864." By the last item the testator appoints Daniel D. Bucklin, of Lansingburgh, and Otis G. Clark, of Troy, executors and trustees of his will, with power of sale as follows: "I authorize them and their successors in this trust, in their discretion, to sell my real estate, and convert same into money."

The facts sufficiently appear in the opinion of the Surrogate.

TOWNSEND, ROCHE & NASON, *for* OTIS G. CLARK, *sole surviving executor.*

MCCLELLAN & MCCLELLAN, *for* SIMON F. MANN, *temporary administrator of the estate of* NANCY A. V. HARTSHORN, *deceased, and others.*

JOHN H. PECK, *for* TROY ANNUAL CONFERENCE.

KING & KING, *for* TROY ORPHAN ASYLUM.

HORATIO G. GLEN, *for executors of the estate of* MYNDERT SCHERMERHORN, *and others.*

MATTHEW HALE, *for* WILLARD K. BROOKS, WALTER BROOKS, *and* BELLE SMITH.

WILLIAM LORD, *for* H. W. GORDINIER, *general guardian of* IDA A. VEDDER, *an infant.*

SEYMOUR VAN SANTVOORD, *for* WILLIAM LORD, *as special guardian of* IDA VEDDER.

SAUNDERS & MYERS, *for* JOHN E. CARY, *and others.*

NELSON DAVENPORT, *for executors of* DANIEL D. BUCKLIN, *deceased, executor and trustee.*

THE SURROGATE.—Several questions have arisen upon this accounting as to the proper disposition to

be made of the fund yet remaining in the hands of the executors and trustees for distribution. The persons presenting adverse claims have been represented by numerous and able counsel, who have passed their views upon the court with great force and ability, and have submitted numerous briefs, evincing great industry and research in the law pertaining to the questions in dispute. The questions involved are substantially questions of law only. I shall consider them in the order of their statement.

The first question is as follows: Is Ida A. Vedder (a legatee under the will of said deceased to the amount of $8,000) entitled to interest upon her legacy from the death of the testator to the death of testator's widow, Nancy A. (Vedder) Hartshorn, which occurred some ten years thereafter?

The facts pertaining to this question are briefly these: Ida Angell, termed in the will Ida A. Vedder, was taken from an institution in the city of New York, when about three and a half years of age, by Mr. and Mrs. Vedder, for the purpose, as appears, of receiving her into their family, and rearing her as their own child; they having no children of their own. A few months after receiving her, the institution (reciting that it had the authority to do so) entered into a formal agreement in writing under seal with Mr. and Mrs. Vedder, by which she was indentured to them as an apprentice until she reached the age of eighteen years, on certain terms and conditions therein mentioned; and it was especially provided in said instrument by the parties thereto that it was the intent and meaning thereof that Ida should be re-

ceived into the family, maintained, clothed, and educated and treated with like care and kindness as if she was in fact the child of Mr. and Mrs. Vedder. The evidence clearly shows that she was so received, educated, clothed, and maintained during the lifetime of the testator, and at his death she continued a member of the family of Mrs. Vedder, and received the same treatment down to the time of her death. A legacy to Ida of $8,000 was given by the codicil to testator's will, made shortly after she became a member of his family. By this codicil he revoked items 9 and 11 of his will, which contained two items aggregating $8,000, which were legacies to adult persons, the interest and income of which was to be paid to his wife, Nancy, during her lifetime, and gave the same to Ida. He terms Ida, in the codicil to his will, his "adopted daughter," but makes no other provision for or mention of her in his will. The income the entire estate, real and personal, including the portion given to Ida, was given to his wife during her lifetime, and there was no provision for the payment of any legacies to anybody, or for the payment of any money for any purpose, prior to her decease; and the entire estate was disposed of by the terms of his will.

The question presented under this state of facts is: "Did the testator intend the legacy of $8,000 to be a provision for the maintenance of his adopted daughter, and that interest be paid her thereon during the lifetime of his wife?" The question is one of intent. The rule is well settled in the construction of wills that the intention of the testator, if not contrary to

law, will, when ascertained by the courts, be enforced. The right of testator to dispose of his property by his will, when not contrary to the provisions or policy of the law, is as well settled as his right to dispose of the same during his lifetime. The legal obligation of a testator to support one as to whom he is *in loco parentis*, or even his own child, continues only during his life. Brown v. Knapp, 79 *N. Y.* 142. It is a well-settled rule of law that legacies draw interest only from the time when either by law—which is one year from death of testator—or by the express terms of the will, they are payable. Lupton v. Lupton, 2 *Johns. Ch.* 626–628; Bradner v. Faulkner, 12 *N. Y.* 472.

But there is a well-settled exception to this rule, which is laid down as follows by the learned and accomplished author of Redfield on Wills: "Where a legacy is given by a parent to his child, or by one *in loco parentis* by way of maintenance, and the possession of the principal deferred, it is held that the legatee is entitled to interest from the death of the testator. But this rule will not apply where the maintenance of the child is otherwise provided for by the will or any other mode." 2 Redf. Wills, p. 566. In Williams on Executors, at page 1429, (marginal paging,) the rule is in these words: "If the legatee be not an adult, interest on the legacy shall be allowed as a maintenance, and from time of death of testator, if there be no other provision for that purpose;" and the rule in the language above quoted from Williams on Executors is stated with approval by DAVIES, C. J., in Cooke v. Meeker, 36 *N. Y.* 19.

The counsel for the guardian *ad litem* of the infant challenges the correctness of the rule as above stated, and insists that the will alone is to be looked to, and that interest upon a legacy, the payment of which is deferred must, where the legatee is the child of the testator, or one to whom the testator stood *in loco parentis*, be paid from the death of testator, where there is no other provision made in the will for the maintenance of such infant legatee. In his view it is immaterial how ample a provision has been made and enjoyed by the infant from any other source; in other words, that nothing will defeat the payment of interest on the legacy to the infant, under such circumstances, but a provision in the will for its support. I am unable to assent to this view of the law, and I think no well-considered case can be found to sustain that position. The language of two or three cases in this state, when considered apart from their facts, lends some support to the doctrine. The cases of Lupton v. Lupton, *supra*, Brown v. Knapp, 79 *N. Y.* 141, and Thorn v. Garner, 113 *N. Y.* 202, are cited in support of the contention of the guardian *ad litem*. But each of these cases, when carefully examined, will be found to state only what is termed the general rule in the construction of wills respecting the payment of interest upon legacies to infants. In each of the cases it is stated in general terms that the rule is that, where there is no provision made in the will for the maintenance of such infant legatee, interest will be allowed from the death of testator by way of maintenance. This rule, as we understand, when taken in connection with the reason upon which it is

based, is to be applied when looking at the will alone, interpreting it by its own terms. Neither of the cases holds or professes to decide that where ample provision is found outside of the will for the maintenance of the infant, whether from the bounty of the testator or otherwise, that the legacy will draw interest from the death of the testator. There is nothing, therefore, actually decided in the cases cited by the counsel for guardian *ad litem* in conflict with the rule as laid down by Judge REDFIELD. Indeed, the courts expressly say in case of Brown v. Knapp, *supra*, that the rule is based upon the presumption that the testator in such a case must have intended that the legatee in the meantime should be maintained at his expense. And in the case of Thorn v. Garner, *supra*, Judge PECKHAM says: "The fact that the legacy was payable to an infant child, ... and there is no other provision made in the will for the maintenance of such legatee, has been regarded as a fact sufficiently indicative of the intention of the testator to authorize the payment of interest from his death, although such direction was not found in the will."

The fact that in such a case no other provision is found in the will for the maintenance of the infant creates the presumption only that the testator intended that interest should be paid upon the legacy from his death. But this presumption may be overthrown not only by the import and terms of the will itself, but also by evidence extrinsic to the will. In the case of Brown v. Knapp, the court, after having stated that the absence of a provision for maintenance

created the presumption that the testator intended the legacy to draw interest, adds that "this presumption is not overthrown by the language [of the will] used in the bequest to his daughter;" thus clearly implying that it was at last simply a question of intent; that the presumption raised upon the one hand in favor of interest is not conclusive, but might be overthrown if a contrary intent appeared in the will. In the case of Thorn v. Garner, the court considers in detail a large amount of evidence extrinsic to the will, for the purpose of ascertaining whether the testator intended the legacy (in that case of $1,000,000) should draw interest from the death of the testator or from the time fixed by law, (one year thereafter,) and reaches the conclusion that, from the evidence furnished by the terms of the will itself and the evidence extrinsic to the will, the testator did not intend the legacy to draw interest until it was payable, and reversed the decision of the court below, which had allowed interest under the rule cited by the learned counsel for the guardian *ad litem*. In the case of Lyon v. Association, 52 *Hun* 359, the very point under consideration here, namely, as to whether the court could look outside of the will for the purpose of ascertaining whether the infant had a provision for its support, was carefully considered, and the court expressly held: "If the fact exists that the legatee is not dependent, then no presumption exists that the testator intended the postponed legacy to draw interest; and it is immaterial whether or not there is other provision in the will for the legatee." And the court adds: "We are not unmindful of the fact that the expression had been used in many cases

where interest has been allowed, 'that no other provision was allotted by the will,' seeming to imply that the will alone can be looked to to determine the question; but, as I have before remarked, if we go outside of the will to make a case for claiming interest, no reason exists for not going outside to defeat interest."

The result of the authorities appears to be to establish this rule: that, where a parent gives a legacy to an infant, and no other provision is found in the will for its support, the legacy presumptively draws interest from the death of the testator, but that the absence of such provision creates a presumption only, which may be overthrown by evidence in the will itself of a contrary intention, or the presumption may be repelled by evidence extrinsic to the will that the infant had other means of support.

First. In the present case it seems clear from the very terms of the will that the testator did not intend said legacy should draw interest from his death, for (1) in express terms he gives to his wife the interest and income of his entire estate, real and personal, leaving no room for inference that he intended interest upon this legacy to be paid to his daughter Ida, year by year, after his decease, during the life of his widow; and (2) he provided in his will no means from which the same could legally be paid, for he specifically devoted his entire estate to other purposes. Thus the presumption is overcome effectually, by the terms of the will itself, that he did intend such payment, and this is fatal to the claim.

Second. The extrinsic evidence is even still more

clear, for from it we learn that Mrs. Vedder had become, with her husband, the guardian of Ida, and upon his death there devolved upon her the legal duty, as well as the moral obligation, to furnish Ida maintenance and support. And it further appears that, mindful of this obligation, Mrs. Vedder did care for her as for her own child, educating and clothing her, and affording her all the advantages which her large income and her station in life enabled her to do during her life.

Third. And it can hardly be doubted but that the testator, in making this ample provision for his wife of the entire income of his large estate, with no one to enjoy it except Mrs. Vedder and the child, Ida, contemplated that he was making a most ample and generous provision for the child of their mutual affection; and the result shows that his expectation was not disappointed, for she received a support in comparison with which the income from the $8,000 would have been a pittance. It is quite common in wills to provide thus indirectly for the education, maintenance, and support of children by simply providing the wife and mother with means for such purpose. Such a provision is usually effectual, while at the same time placing the children under such restraint as experience has shown to be wholesome.

In conclusion upon this point, we think it will hardly be claimed that at any time during the lifetime of Nancy A. Vedder this infant would have been heard in court to compel the payment of this interest for her support. A sufficient answer would have been—*First,* that she was not dependent, but was in

receipt of ample maintenance; *secondly*, that there was no fund provided by the will for the payment of such interest, and consequently none was intended; and, *thirdly*, that, as the legacy was not intended for her maintenance, no interest was payable upon it until it became due.

The second question presented for decision is: "Are the personal representatives of Nancy A. (Vedder) Hartshorn entitled to receive as profits, under the terms of the will, the increase in the value of the securities held by the executors and trustees of Nicholas S. Vedder, deceased, since 1882,—the time of the entry of the decree upon the first judicial settlement of said estate by the Surrogate; or should such increase be held to be a part of the principal sum, and be divided among those entitled to receive the same?" These securities were inventoried, and constituted the greater portion of the estate of said testator. His widow received the income therefrom during her lifetime. After her death the executors converted them into money, and realized by their sale an advance of $10,200. The second item of the will provides as follows: "I give and bequeath to my said wife, Nancy A. Vedder, the income and profits of all my other estate, [the first item of the will gave her goods valued at $1,000,] both real and personal, of which I shall die seised or possessed, for and during her natural life." The testator died possessed of both real and personal property to a large amount. The will authorized the executors, in their discretion, to sell the real estate, and convert the same into money. The personal representatives of Mrs. (Vedder) Hartshorn insist that, since

under the terms of the will she is entitled to receive the "income and profits" of the estate during her lifetime, she should receive as income of the real and personal estate the rents and interest, and also something beyond that, namely, the profits, and that the accretion to said securities, which is assumed to have accrued during her lifetime, is such profits. Unquestionably, if the testator intended that his wife should receive whatever of increase in value accrued to his estate during her lifetime, and had so stated in his will, there is no legal principle that could be successfully interposed to prevent its receipt by her, if ascertained in her lifetime, or by her personal representatives after her decease.

First. The first question then is; did the testator so intend and provide in his will? The word "profits," when applied to trade or business, means "the advance in price of goods sold beyond the cost of purchase." Bouv. Law Dict. The word "profits," when applied to real estate, means "the produce of lands," and is, as used in the phrase "rents, issues, and profits," synonymous with "rents." Burrill, Law Dict., p. 344. "Rents and profits" of real estate means "the sum annually yielded" by the same. Delaney v. Van Aulen, 84 *N. Y.* 23. The testator died seised of a large amount of real estate, which, for aught that appears, produced or was capable of producing, an income; and, as the testator left it to the discretion of his executors when to sell the real estate, it may be fairly inferred that the word "profits" was used by the testator with reference to such rents as might be received by the executors from the

real estate during the life of his wife. Indeed, it seems to us that the meaning of these terms, in the connection used, is too clear to require construction. Certainly the words used are apt to express an intent by the testator, if entertained by him, to give to her the use and income of his estate, real and personal, and that alone; and it may be worthy of note that the Supreme Court, in construing the will, used the phrase "income and profits" as synonymous with "use and income."

Second. We find no evidence in the remaining provisions of the will, nor in the surrounding circumstances, from which it may be inferred that the testator intended to give his wife any sum greater than the annual income or interest and the rents of his estate.

Third. Since there is nothing in the terms of the will itself nor the surrounding circumstances indicating any specific intent on the part of the testator that his widow should receive the increase in the value of his estate during her lifetime, the claim of her personal representatives, if any, must be based upon the legal proposition that the advance or increase in value of the estate or of the securities, under the circumstances here disclosed, belonged to her as life-tenant, without reference to any specific intent on the part of the testator to give her the same. This proposition, we think, cannot be successfully maintained. This very question has been repeatedly before the courts, and it is now settled by numerous and authoritative adjudications. The rule, as settled, may be stated broadly to be that an increase from natural causes in the value of real and personal estate

held as an investment does not constitute profits, and go to the life-tenant, but such increase becomes principal, and goes to the remainder-men. In Matter of Gerry, 103 *N. Y.* 450, a case much in point, the court say: "The theory of the will did not contemplate any traffic in securities by the trustees, but a permanent investment in interest-bearing obligations, subject to be sold or exchanged when the exigencies of the trust required it to be done." And the court adds: "If the will had required the trustees to invest in real estate, the rents, incomes, and profits of which were made payable to the life-tenant, with a remainder over, it cannot be questioned but that any increase in the value of the lands from natural causes would have been an accretion, and inured to the benefit of the remainder-men." Perry, Trusts, § 545, p. 486; Cogswell v. Cogswell, 2 *Edw. Ch.* 231, 440. "And we cannot see any difference in principle between this [an increase in value of securities] and the one supposed, [an increase in value of real estate.]" The court further says: "The question here presented was up in the case of Townsend v. U. S. Trust Co., 3 *Redf.* 222; Whitney v. Phœnix, 4 *Redf.* 180, before the Surrogate of New York, and it was there held that an enhancement of the value of United States bonds, held in trust, went to the remainder-men, and not the legatee for life. These decisions accord with our views." See, also, Clarkson v. Clarkson, 18 *Barb.* 646; Scovel v. Roosevelt, 5 *Redf.* 121; Matter of Pollock, 3 *Redf.* 114; Matter of Kernochan, 104 *N. Y.* 618.

Finally. If the term "profits" could, in view of

the law, be held to include the difference between the inventoried value of these securities in 1882 and the price for which they were sold after the death of Mrs. Hartshorn, in 1890, still she would not be entitled to the profits as such, since there was no sale or realization during her lifetime. It is well settled that until the securities are actually sold and the transaction completed, there are no profits. Increase in value becomes profit only when realized by sale; and in this case, there having been no actual realization or receipt of profit during the life of Mrs. Hartshorn, neither she nor her personal representatives are entitled to it. Jennery v. Olmstead, 36 *Hun* 536, affirmed 105 *N. Y.* 654. It follows that the increase in the value of these securities must be held to belong to the principal, and be distributed as a portion of the same.

The third and remaining question is: Are the grandchildren of testator's deceased sister, namely, Willard Brooks, Walter Brooks, and Belle Smith, entitled to share as heirs at law in that portion of testator's real estate as to which, according to the decision of the Supreme Court, the testator died intestate; or must the entire estate, real and personal, be distributed as personalty to the widow and next of kin of said deceased? After the death of his widow, the testator, by his will, gives certain legacies to the different persons therein named, and finally of the entire remainder of his estate he gives, devises, and bequeaths one half to the Troy Orphan Asylum, and the other half to the trustees of the Troy Conference. Shortly after the death of the testator the executors

brought suit against the widow, legatees named in the will, the heirs at law and next of kin of said deceased, for the construction of said will, and all parties appeared and answered. The executors alleged in their complaint that they were advised that certain provisions of said will for the benefit of the Troy Orphan Asylum and Troy Conference were, under the facts stated by them, invalid under the laws of this state, and asked the judgment of the court thereon. The court held and decided that the gifts to the Troy Orphan Asylum and the Troy Conference, so far as they exceeded one half of the testator's estate, were prohibited by law, and were void; and that as to the remainder of the estate the testator died intestate, and the same must be distributed according to the laws of distribution applicable to cases of intestacy. The court further held and decided (the question having been directly raised by the pleadings) that "said will provided for the conversion by the executors of the real estate left by the testator into personal property, and that the whole estate must be considered to be and be treated as personal property." And the judgment in the case provided, in terms, "that such excess belongs to the widow, said Nancy A. Vedder, and the next of kin of said Nicholas S. Vedder, to be divided among them in the manner provided in the statute regulating the distribution of personal property among the widow and next of kin, as in case of intestacy."

The testator left no children, but nephews and nieces, and the grandnephews and grandniece above named. The right of these grandnephews and the

grandniece to a portion of the testator's estate is now only in question. As to the personal property of the deceased these grandnephews and grandniece have no claim, (2 *Rev. St.*, p. 97, § 75, subd. 11,) but of the real estate they would ordinarily take their portions with the nephews and nieces as heirs at law in case of intestacy, (Id., § 75, subds. 8, 9.) It is conceded that the testator left sufficient personal property to pay all his debts and legacies, including the portion of the estate to which the Troy Orphan Asylum and the Troy Conference are by law entitled. It is insisted by the counsel for the said heirs at law that, as the testator died intestate as to the remainder of his property, after payment of debts and legacies, a considerable portion of which is real estate, and as a large portion of that remaining to be distributed upon this accounting is the proceeds of the sale of real estate, the heirs at law are entitled to share in the distribution of the proceeds of said real estate. And it was further insisted by said counsel that, notwithstanding the court held by its judgment that by reason of the power of sale to the executors the whole estate left by the testator became converted into personalty, yet such conversion into personalty, was only for the purpose of the will; and that, if any estate or interest in the fund arising from the sale is not legally and effectually disposed of by the will, there is a resulting trust or interest in favor of the heirs at law. In other words, the claim is that it is settled as a matter of law that, where there is a partial failure of the objects of the conversion, the undisposed portion of the surplus, where it is real estate,

will result to the heirs, and that this is always so where there is no "out and out conversion," such as follows a peremptory direction to the executor to sell; and a number of authorities are cited in support of such position. We are inclined to think, although the earlier authorities are not altogether uniform, that the later authorities support this contention of the counsel for the grandnephews and grandniece of the testator.

In the case of Chamberlain v. Taylor, 105 *N. Y.* 185, Judge RUGER, speaking for the court, says: "The legal right of an heir to the real property of a deceased person cannot be defeated except by a valid devise of the property to another; and, although a testator may have intended a conversion of his real estate, this does not affect the transfer of title unless the intention is manifested in the mode and language required by the statute." And the learned judge adds: "The authority given the executor to sell the real estate did not work an equitable conversion, as there was no necessity for such conversion to satisfy the valid provisions of the will."

But the heirs at law (grandnephews and grandniece) have not overcome the chief obstacle to their recovery. Let it be conceded that the equitable conversion of the estate was only for the purposes of the will, and that its purposes have all been met without recourse to the real estate, and that said heirs at law are entitled to share therein under the laws of descent, there still remains the judgment of the Supreme Court construing said will, to which the heirs at law and next of kin were parties, where the issues were

specifically and definitely framed to obtain a decision from the court upon the very question raised here.

It is not contended by the counsel for the heirs that the court did not have jurisdiction of the subject-matter and of the parties; in other words, that the executor was not authorized to seek the direction of the court as to the construction of the will or of the several provisions of the will as to which question was raised by the pleadings. But it is insisted by the learned counsel for the heirs that, "so far as the suit or action asked the court to decide as to whether that portion of the estate as to which the will was ineffectual went to the heirs at law or next of kin, it went beyond 'the proper object and scope of such suit;' and any adjudication upon the question was, therefore, not binding upon the parties in a proceeding like this, to determine who is entitled to the real estate now in the hands of the executors, and remaining for distribution." Numerous authorities are cited, holding, in effect, that the rights and interests of parties to actions which were not the proper subject-matter of such action or within its scope and object are not conclusively disposed of by the judgments therein. Rathbone v. Hooney, 58 *N. Y.* 463; Outram v. Morehood, 3 *East*, 346, 357. We do not think that doctrine applies here. It was within the "proper object, purpose, and scope" of the action for the construction of the will that the executors should have determined—*First*, if there was any portion of the estate as to which the testator died intestate; *secondly*, (as it was the right at least, if not the duty, of the executor under the power of sale to convert

the real estate into money for the purposes of their trust,) to obtain the direction of the court as to what ultimate disposition should be made of the proceeds after the death of the widow. This was a question proper to be raised and decided by the court to enable the executors to perform their duty. It was answered by the court, whether right or wrong, (presumptively it was right, since no appeal was taken by the heirs,) that the whole property, real and personal, was, under the terms of the will, converted into personalty; and that the whole of that portion as to which the testator died intestate must be distributed among the widow and next of kin as personal property, under the statute of distribution.

The decisions are ample that such an adjudication, made in the construction of a will, is binding upon all parties in any litigation which may thereafter arise between any of them concerning any of the provisions of the will directly passed upon in construing the same.

The general rule is well settled that a final judgment or decree of a court of competent jurisdiction is conclusive in every other suit between the same parties as to all matters and questions therein properly determined, or which might or ought to have been determined therein. Doty v. Brown, 4 *N. Y.* 71; Demarest v. Darg, 32 *N. Y.* 287; Brown v. Mayor, 66 *N. Y.* 391; Chamberlain v. Taylor, 105 *N. Y.* 185; Leavitt v. Wolcott, 95 *N. Y.* 222; Chamberlain v. Chamberlain, 43 *N. Y.* 424. Also that infants represented by a guardian *ad litem* are bound to the

same extent as adults. Walsh v. Walsh, 116 *Mass.* 377; Mutual Life Ins. Co. v. Schwaner, 36 *Hun* 373.

That this rule applies to this case we think there can be no doubt. If so, the grandnephews and grandniece of testator are, much as we must regret the result, excluded from all participation in the fund solely by reason of the judgment in the suit for the construction of the will. Let it be conceded that they, as heirs at law of testator, immediately upon his death took, under the law, title as tenants in common with the nephews and nieces to that portion of the real estate as to which the testator died intestate, the fact still remains that a suit was properly brought, in which they were parties, and in which the question was squarely presented as to whether any portion of the estate as to which the testator died intestate should, upon a proper application of the rules of law applicable to the construction of the terms of the will, go to the heirs at law; and the court decided that the whole estate was by the terms of the will, under the circumstances, equitably converted into personalty, and must go to the widow and next of kin, and not the heirs at law.

The application of the doctrine of *res adjudicata* to cases involving the construction of wills is not a matter of reasoning alone. In the case of Chamberlain v. Taylor, 105 *N. Y.*, *supra*, which was an action of ejectment from certain real estate which had passed under a will, the construction of which had been determined by the court between the same parties in a former action, brought especially for that purpose, (Chamberlain v. Chamberlain, 43 *N. Y.*

424,) the court say in substance that, as all the parties to this suit (ejectment) were before the court when the will under which the real estate passed was construed, either party can now be heard, whether the ejectment was right or wrong, to call in question the construction then given to the provisions of the will. See, also, cases of Leavitt v. Wolcott, *supra;* Bowers v. Smith, 10 *Paige*, 193. The case of Bowers v. Smith holds that, although the decision of legal questions, such as title to real estate in construction of wills, belongs exclusively to courts of law, yet such questions may, when they incidentally arise, or where the court has obtained jurisdiction for some other purpose, be conclusively determined upon the construction of wills in a court of equity. The case of Demarest v. Darg, *supra*, holds that the rule of *res adjudicata* applies, although the adverse parties were nominally defendants in suit in equity; since they have in such suit ample opportunity to assert their rights not only as against the plaintiffs, (executors,) but against each other. These considerations lead to a denial of the right of the grandnephews and grandniece, as heirs at law of said deceased, to participate in the distribution of the fund.

Let a decree be prepared and submitted in accordance with the views herein expressed.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—June, 1891.

MATTER OF BUTLER.

In the matter of the judicial settlement of the account of CHARLES C. LLOYD *and* EDWARD B. BUTLER, *as executors of the will of* CHARLES H. BUTLER, *deceased.*

A voucher in proper form filed by an executor, to support an alleged payment, may be impeached by showing that a portion only of the amount therein stated has been paid, and the validity of the voucher cannot be sustained by showing that in fact the executor is liable for the remainder of the sum therein stated.

ADELAIDE L. BUTLER, the widow of testator, objected to a voucher for $3,566.87 for a counsel fee paid to S. F. Kneeland upon the ground that the evidence showed that of this amount only $650 had been paid by the executors.

KNEELAND, STEWART & EPSTEIN, *for the executors.*

FROST & MANSER, CALVIN FROST *of counsel, for residuary legatee.*

C. W. HORTON, *for special guardian.*

THE SURROGATE.—The account shows that this estate was of the value of nearly $300,000, and it was to be expected that any competent counsel who advised and assisted the executors in the discharge of their duties should be suitably rewarded for his services. Much testimony has been taken in regard to

their value, but as the matter stands it does not seem necessary for the court to enter upon the unpleasant and unsatisfying task of fixing such value, nor of determining whether certain of the items are properly chargeable to the executors. Ordinarily, when a duly verified account has been presented with proper vouchers for credits claimed, it is all that can be required of the accounting party. If, however, an item be objected to for which there is a proper voucher, the voucher may be assailed by the objector. He may show that the signature thereto is forged; that the amount it represents was not due to him who executed it; that it has not, in fact, been paid, or that only a portion of it has been paid. In short, he may impeach the voucher. Among the numerous cases on this subject, reference is made to Metzger v. Metzger, 1 *Bradf.* 265; Clock v. Chadeagne, 10 *Hun* 97; Swenarton v. Hancock, 22 *Hun* 43; Austin v. Munro, 47 *N. Y.* 360; Budlong v. Clemens, 3 *Dem.* 145; Matter of Collyer, 1 *Conn. Surr. Rep.* 546; Matter of Casey, 6 *N. Y. Supp.* 608; and see section 2733 of the Code. In this case the voucher has been successfully impeached. It represents, and they swear in the affidavit annexed to the account, that the executors have paid to counsel for services rendered, and for which they ask to be allowed, as expenses paid by them in the discharge of their official duties, the sum of upwards of $3,500, when the proof is that they had so paid only $650. They can be allowed only what they have actually paid, and not what they may be liable to pay. If they were to be allowed the larger sum, it is possible they might

never pay the difference, and so gain it to themselves from the estate. This cannot be permitted. As has often been remarked in like cases, this is not a question as between client and counsel, but as between the executors and the estate. The impeachment of the voucher and of the affidavit verifying the account is not understood to be based upon any charge of fraud on the part of the executors or their counsel, but rather upon a misapprehension by them of the law on the subject. The item objected to must be reduced to the amount actually paid. The executors will be allowed costs as if there had been no contest, to be adjusted, and the contestant will be allowed costs of the contest, in like manner to be adjusted.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—June, 1891.

MATTER OF STRONG.

In the matter of the application for the probate of the will of ELIZA STRONG, *deceased.*

Where one witness to a will, at the request of the other witness who is prevented from signing by physical disability, signs the name of that witness to the will, this is a sufficient signature to comply with the statute. (4 R. S., 8th. ed., p. 2547, § 40, subd. 4.)

APPLICATION by Edward Strong, executor, for the probate of the will of Eliza Strong, deceased.

MATTER OF STRONG.

Darius A. Secor was a witness to the will of deceased, and at request of testatrix and in her presence signed his own name as witness, and at the request of his wife, Sarah Secor, who was requested also by testatrix to sign as a witness, but who was incapacitated from writing by reason of a felon on her hand, signed her name also. After the death of testatrix, Mrs. Secor caused her name as written by her husband to be erased, and she then signed her name in place thereof.

A. R. DYETT, *for executor.*

JOHN F. LAMBDEN, *for contestant.*

THE SURROGATE.—The question as to whether the alleged will was sufficiently executed according to the requirements of our statute on the subject, inasmuch as the names of both witnesses were written solely by one of them, is alone presented for adjudication. In this respect it will be seen that, while the statute requires that the will shall be "subscribed" by the testator at the end of the will, it also provides that "there shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will at the request of the testator." Thus there is a change from the word "subscribed," as applied to the act of the testator, to the words "sign his name," as applied to the act required of the witnesses. Whether it was intended by the legislature to treat the words "subscribe" and "sign" as synonymous is fairly open to question. If it did not so intend, why did it not use the same word in each in-

stance? The word "subscribe," according to the best lexicographers, is to write underneath, while "sign" is defined, to affix a signature to. And it was held in the English courts that the word "sign," as used in the statute of frauds, was sufficiently complied with if the party wrote his name on the paper in any place, so that if even he commenced by writing, "I, John Jones," and wrote his name in no other place, it was held a sufficient signing within the statute; but the word "subscribe" clearly means a writing at the end or foot. And, while they have given a very liberal, if not loose, construction of the word "sign," in so far as the statute of frauds affecting contracts was concerned, yet in case of wills, where the witnesses are required to subscribe as such, they exacted some physical act to be done by the witnesses, either by writing their own names or making their marks. Moore v. King, 3 *Curt. Ecc.* 243; 1 Jarm. Wills, (Rand. & T. Ed.) 215. But that statute expressly permitted the signature of the testator to a will to be made by some other person in his presence and by his direction. 1 Rev. Laws., p. 364, allowed the same thing. Under these statutes it was held that the signature of the testator or of the witnesses by making a mark was sufficient. Baker v. Dening, 8 *Adol. & E.* 94; Jackson v. Van Dusen, 5 *Johns.* 144. Many other and more recent cases establish the same principle.

But the question still remains; is the name of one or each of the witnesses, written by another, a sufficient compliance with the requirement of the statute? In Goods of John White, 2 *Notes Cas. Adm. & Ecc.*

461, it appeared that a husband, a witness, signed not only his own name, but also that of his wife, the other witness. There was no evidence that the wife had, in fact, become a party to the subscription, and the execution was held to be insufficient. Here, however, the wife was present as a witness, and, because of her temporary disability to write her name, requested her husband to write it for her, which he did. All this occurred at the time of the execution of the will by the testatrix and in her presence, and although the latter did not also request the husband to write the wife's name, yet by her silence she sanctioned the act. Surrogate BRADFORD, eminent for learning and industry, seems to have inclined to the opinion that an attesting witness must take some physical part in the act of signing, in order to a compliance with the statutory requirement of signing his name. Campbell v. Logan, 2 *Bradf. Sur.* 90–97; Meehan v. Rourke, Id. 385–392. This is probably in accord with the tenor of English decisions on the subject, with some few exceptions.

But while the precise question has not, so far as known, been determined by the courts of this state, yet in some of our sister states a subscription by a witness in the manner it was done in this instance has been held sufficient. In Massachusetts, in the case of Chase v. Kittridge, 11 *Allen*, 49–59, GRAY, J., says: "A subscription of the name or mark of a witness by another person in the presence of himself and the testator might possibly be a literal compliance with the statute, but, not being in the handwriting of the witness, would create no presumption of a law-

ful execution and attestation, without affirmative evidence that it was so made." Here we have such affirmative evidence. See, also, Horton v. Johnson, 18 *Ga.* 396. In Upchurch v. Upchurch, 16 *B. Mon.* 102, and in Jesse v. Parker, 6 *Gratt.* 57, it was expressly held that such a signing of the witness's name as occurred in this instance was a sufficient execution under a similar statute. In the latter case we have presented the singular fact of a will being sustained where the body of the will, the name of the testator, and of the three witnesses required in that state, were all in the handwriting of one person. As was well said in that case: "Where the attestation is by mark, the validity of such an attestation does not depend upon the fact of the witness making his mark, or doing some manual act in connection with the signature, but upon the signing of the name of the witness by his authority."

The maxim, *qui facit per alium facit per se*, has, doubtless, its limitations; but it is difficult to discover why it is not applicable here. The frauds in the execution of wills which the statute was designed to guard against will in no way be facilitated by the sanctioning of this mode of execution. Still, where we consider that the art of writing is so common that there can be little trouble in finding witnesses who can write their names, it is desirable that wills should be witnessed by such persons, especially in view of the fact that should they make their mark, or sign by the hand of another, and they should predecease the testator, there would be no possibility of proving their handwriting, and then the will could

not be admitted to probate, unless other persons should chance to be present who could testify to the facts; for the statute provides that, in case the witnesses be dead, the will may be established by proof of the handwriting of the testator and of the subscribing witnesses. Code, § 2620. At first my impression was that the execution of this will was insufficient, but a further examination of authorities and subsequent reflection have led to a different conclusion. It is therefore held to be a valid will, in so far as its execution is concerned.

RENSSELAER COUNTY.—HON. JAMES LANSING, SURROGATE.—June, 1891.

MATTER OF WILLIAMS.

In the matter of the application for the probate of the will of ROXALANA WILLIAMS, *deceased.*

Before subscribing her will testatrix declared in the presence of the witnesses that it was her last will and testament and requested them to sign the same as witnesses. Testatrix immediately thereupon signed her name to the will, and the witnesses, as soon as she had subscribed her name, signed the will in her presence, as witnesses. *Held*, that this was a compliance with the statutory requirements as regards the execution of a will. 2 R. S., p. 63, § 40.

On a contested application for the probate of a will the question was raised as to the genuineness of the signature of testatrix. The name of testatrix at the commencement of the will, in the attestation clause and signature, was written "Roxy Lany Williams." The contestants introduced in evidence papers, executed by testatrix at about the time of the execution of the will, to which testatrix

signed her name as "Roxalana Williams," and there was evidence also that since the execution of the will testatrix had denied that she had made a will. The name was usually written in one word "Roxalana," but it appeared that she had on one or more occasions signed her name "Roxa L. Williams," and her silver spoons and pillow cases were marked "R. L. W." and "R. L. H." In her will she gave certain spoons marked "R. L. H." to one of the legatees.

Proponents also produced several papers signed by testatrix many years before her death to which her christian name was signed, "Roxa Lany," and "Roxa L.," and also a deed from her brother in which she was named as grantee as "Roxa L. Williams." A number of experts were called on both sides, but the greater number testified that the signature of the will was genuine. The positive testimony also of the two witnesses to the will showed that they saw testatrix affix her signature to the will. *Held*, that the will should be admitted to probate as the signature was shown to be genuine.

It was shown that testatrix was about eighty-two years of age, was quite deaf and somewhat feeble in health. The memorandum for the will was prepared by the principal beneficiary without the presence or knowledge of any other person, so far as appears. There had existed between testatrix and the beneficiary the most tender relations, existing for years, amounting almost to those between mother and daughter, and growing closer as time progressed. The said beneficiary was not a relative either by blood or affinity. The blood relatives, heirs at law and next of kin of the deceased were not mentioned in the will, although deceased had frequently said she expected a portion of the property to go to them. These circumstances, it was claimed by contestants, established that the alleged will was the result of moral coercion amounting to fraud. *Held*, that there was not sufficient proof of undue influence.

Undue influence must be an influence exercised by coercion, imposition or fraud, and not such as arises from gratitude, affection or esteem, and its exertion upon the very act charged to have been effected by it must be proved. It will not be inferred from interest and opportunity, and if on the other hand there is adduced proof of capacity, mature deliberation, settled purpose and absence of fraud and imposition, the will must be deemed to be the exercise of personal right and be respected accordingly.

If an aged and infirm testatrix was at the time of the execution of a will, of sound mind and memory, was able to know and retain in her mind the value and extent of her property, and those who were or might be the proper objects of her bounty, and to choose intelligently between them, and uninfluenced by fraud did so choose, then whatever her age or infirmities or however completely she excluded her blood relatives from participation in her bounty, or however intimate her relations may have been with the principal beneficiary, or however great may

have been the influence of that beneficiary as the result of kind offices and considerate treatment of deceased, the will made by her must stand.

APPLICATION for the probate of the last will of Roxalana Williams, deceased.

The facts fully appear in the opinion of the Surrogate.

WARREN, PATTERSON *and* GAMBELL, *for* NORMAN CARPENTER, *executor.*

SMITH & PARMENTER *and* JOHN HALL, *for* JULIUS HALL *and* EMORY HALL, *heirs at law, contestants.*

THE SURROGATE.—The will of the above named deceased was admitted to probate by my predecessor, Mr. LORD, some time in 1889, after a somewhat careful examination and cross-examination of the subscribing witnesses by the attorneys for the respective parties. Subsequently, and about February, 1890, by consent of the parties, the probate of the will was revoked, upon the stipulation that the testimony already taken should stand; and thereupon the contestants proceeded to offer testimony upon their part. The will before the present Surrogate is contested upon four grounds:

First, that the will was not executed with due statutory formalities.

Second, that the signature to the will was a forgery.

Third, that the execution of the will was procured by undue influence or fraud.

Fourth, that at the time of the execution of the will the decedent was not of sound mind and memory.

The material facts in this case are as follows: Roxalana Williams, who was the widow of John B. Williams, died in the month of October, 1888, at the age of about 82 years. She was somewhat feeble in health for a year or two prior to her decease, but was not confined to her bed or room until a short time prior to her death. For a number of years prior and down to the time of her death, she had been quite deaf, and unable to hear any words spoken to her, but conversation was carried on with her by use of a slate or tablet of paper, aided by signs or gestures. Questions were usually written upon paper or slate, and verbal answers given by her. She was an intelligent woman, of an apparently active mind, and a large number of witnesses testify that she conversed readily and intelligently in the method above described. Ever since the death of her husband, which occurred forty years or more prior to her death, she had resided with her brother, Jacob F. Hall, a bachelor, upon his farm of about 140 acres, situate in the town of Pittstown, which was of the value of about $5,000. Her brother was also possessed of personal property of the value of about $20,000. Mrs. Williams had a small property of her own, not to exceed $4,000 or $5,000, but no real estate. Jacob F. Hall died on the 28th of February, 1887, having been in feeble health for some months prior to his death. The disease was softening of the brain. He died intestate, leaving his sister, Mrs. Williams, his sole heir at law and next of kin. On the 17th of February, 1887, the will in question here is alleged to have been made. It appears from the testimony offered by the proponent

that about two weeks prior to the execution of the will, Merritt Snyder, who resided about two miles from the residence of Jacob F. Hall, where Mrs. Williams then lived, was requested by Mr. Carpenter, the husband of the principal beneficiary in this will, who lives upon the farm adjoining Mr. Snyder, to call upon Mrs. Williams, as she wanted him (Snyder) to do some writing for her. Mr. Snyder states that he went over and saw her; that they went into the room off from the kitchen, and that Mrs. Williams said she wanted him to do some writing for her,—to draw her will. He wrote on the slate that he would do it, if she would dictate to him just what she wanted. She wrote, in reply: "I don't know who I will get for witnesses." He wrote that "he could be one, and his wife could be another." She said: "I didn't think you could witness it if you wrote the will." He nodded that he could. This is all that took place between them at that time. Two or three days afterwards Mrs. Carpenter brought over and gave to him a memorandum for Mrs. Williams' will. The instructions were drawn in Mrs. Carpenter's handwriting. Within a day or two Mr. Snyder made a draft of the will from the memorandum, interlined it somewhat, to make it correspond with the instructions, and then made a copy of the draft, which he subsequently compared with his wife, she holding the draft, and he holding the completed copy. The next morning Mr. Snyder and his wife went over to the house of Jacob F. Hall; got there about 9 o'clock. They found there, in the kitchen, Mrs. Williams, Mr. Hall, Mrs. Carpenter, Mr. Downey, and Hannah Eldredge. Shortly

after his arrival Mr. Snyder handed Mrs. Williams the will. She left the room, and went to her own room, and, after the lapse of about thirty minutes, she came into the sitting-room, a room adjoining the kitchen, where she found Mr. Snyder and his wife sitting by a fire, which in the meantime had been built by Mrs. Carpenter. When Mrs. Williams came in Mrs. Carpenter left, and closed the door. On coming into the room, in the presence and hearing of Mr. Snyder and his wife, Mrs. Williams stated that it (referring to the will) was "all right; just as she wanted it." Then Mr. Snyder wrote upon the slate: "Do you acknowledge this to be your last will and testament, and do you want us to sign it,—my wife and I?" and she said: "Yes; but I must first sign it myself." Mrs. Williams then sat down. Snyder gave her a pen, and she wrote her name as it appears in the will, "Roxy Lany Williams." Thereupon Mr. Snyder and his wife wrote their names below as witnesses. The testatrix then said that "that was her will, and she was glad it was done." Snyder then folded up the paper, handed it to her, and she handed it back to him, saying she wished he would keep it for her.

This will remained in the possession of Mr. Snyder until after the death of Mrs. Williams. Not long after the death of Jacob F. Hall, which occurred the 28th of February, 1887, Mrs. Williams removed to the house of Norman Carpenter, with whom she resided until her death. Harriet Carpenter, the wife of Norman Carpenter and principal beneficiary in the will, was the adopted daughter of Mrs. Smith Harrington, who was a sister of Mrs. Williams. Mrs. Har-

rington died some twenty-five years ago or more. It appears that there had existed, for years prior to the death of Mrs. Williams, a great degree of intimacy between Mrs. Williams and Mrs. Carpenter. Mrs. Carpenter was accustomed to visit Mrs. Williams quite frequently at her home, and to nurse and attend her in sickness, and Mrs. Williams gave frequent expression to others of her affectionate regard for Mrs. Carpenter. There was a large number of witnesses who testified upon this subject. While some of them were partial and interested, there were several others whose position and relation to the parties place them above suspicion of bias or prejudice. To one witness Mrs. Williams stated that "she thought a great deal of her, [Mrs. Carpenter,] and would do well by her, and that Mrs. Harrington, when she was going to die, said she had tried to be a mother to Hattie, and that she wanted her [Mrs. Williams] to take her place, and she had tried to do so. To another she said she thought more of Hattie than any one else living. To another, she "thought a great deal of her, and if she was her own daughter she didn't think she could think any more of her." To still another: "She was my sister's daughter. She does everything for me. I don't know what I would do without her." Ten years prior to her death she said, when sick, to her physician: "Hattie is my mainstay; she is always ready to come." There is no contradictory evidence upon this subject.

These statements, and many others testified to by the witnesses, show that the relations between these persons, Mrs. Williams and Mrs. Carpenter, were very

close and affectionate. They undoubtedly continued so down to the time of her death.

The nearest blood relatives of Jacob F. Hall and Mrs. Williams were three cousins residing in the state of Connecticut, who are the contestants herein. There had been some visiting and some correspondence between them, but, for the thirty years prior to the death of Jacob F. Hall and Mrs. Williams, the visits between them were very few, and the letters were quite infrequent, not to exceed one or two for a period of ten years prior to the death of Mrs. Williams. After the death of Jacob F. Hall, and while Mrs. Williams was residing at Mr. Carpenter's, on the 28th day of August, 1888, Mrs. Williams executed a deed of the farm which she had inherited from her brother to Harriet Carpenter, for a consideration of $1 and affection. This deed was drawn by Jonathan Hoag, a justice of the peace residing some three or four miles from the residence of Mr. Carpenter, who was a stranger to her. He drew it at the suggestion of Mr. Snyder, who was himself informed by Mr. Carpenter that Mrs. Williams wanted a deed of the farm drawn. He prepared the deed, assisted by Mr. Snyder, and visited Mrs. Williams at Mr. Carpenter's. Upon examining it she called his attention to an error. He had written the name of the grantee as Harriet Harrington, instead of Harriet Carpenter. Thereupon he erased the name of Harrington and inserted Carpenter, and the deed was executed by her and acknowledged before him. The will of the deceased gives a legacy of $1,000 to Mrs. Carpenter, and $100 each to two other persons, and $50 each to two others, and

the rest and residue to Harriet Carpenter. The principal part of the estate conveyed by the will is that derived by Mrs. Williams as heir at law and next of kin of her brother, Jacob F. Hall.

Considerable testimony was taken upon the trial in regard to the genuineness of the signature to the will. A large amount of expert testimony was produced upon each side, the contestants claiming that the signature to the will was not that of the deceased. The signature to the will (the Christian name) is written in two parts "Roxa Lany." It was usually written by Mrs. Williams in one word, "Roxalana," each syllable terminating in "a" instead of "y." It appeared, however, that she had upon one or more occasions signed her name "Roxa L. Williams," and her silver spoons and pillow-cases were marked "R. L. W." and "R. L. H." In her will she gives certain spoons marked "R. L. H." to one of the legatees.

The first question presented for decision in this case is: Was the alleged will executed in compliance with the statute? The statute contains four requirements, the lack of either of which renders the execution of a will invalid: *First*, the instrument must be signed at the end by the testator; *second*, it must be subscribed, or the subscription acknowledged, by testator, in the presence of at least two witnesses; *third*, it must be declared to be his last will and testament by the testator at the time of the subscription, or acknowledgment of subscription, in the presence of each witness; *fourth*, it must be signed by each of two witnesses at the end, in the presence of the testator, and at his request. 2 *Rev. St.* p. 63, § 40.

The following general rules have been adopted by the courts in the construction of this statute:

First. The order, in which the formal acts of execution and publication should be done is not material, except that the testator must sign before the witnesses. Jackson v. Jackson, 39 *N. Y.* 153; Rugg v. Rugg, 21 *Hun* 383.

Second. The law does not require a technical and literal compliance with the statute; a substantial compliance with its requirements is sufficient. 1 Redf. Wills, (3d ed.,) *218, and cases cited.

I think the evidence shows that there was at least a substantial compliance with the statute in the execution of this will. *First.* The will was subscribed by testatrix at the end, in the presence of the witnesses. *Second.* It was at the time of making the subscription, but before it was signed, declared by her to be last will and testament. *Third.* The witnesses signed after the will had been subscribed by her, in her presence, and at her request, although the request to the persons to sign as witnesses was made before the subscription of the will. It has been held that the request to sign as a witness need not be actual, but may be implied from circumstances; as "where persons are called to witness a paper, which they do, in the presence of the testator, he at the same time subscribing it, and declaring it to be his last will and testament." Butler v. Benson, 1 *Barb.* 526; Hutchings v. Cochrane, 2 *Bradf.* 295. It has been further held that the declaration may be made immediately before, as well as after, the subscription, if on the same occasion, and forming part of the same

transaction. Jackson v. Jackson, *supra*. As this construction of the statute covers all of the alleged defects, it must therefore be held that the formalities necessary for the due execution of the instrument were complied with.

The next question, and one which was greatly contested upon the trial, is as to the genuineness of the decedent's signature to the instrument propounded as her will. The contestants, in support of their contention, produced a number of signatures of the alleged testatrix, made about the time of the alleged execution of the will; notably signatures attached to the papers which Mrs. Williams executed upon taking out letters of administration upon her brother's estate, signatures to the petition and bond, and also to the deed executed within a few months after the will. In each of these instances the Christian name "Roxalana" is signed in one word, whereas in the will it is signed "Roxy Lany," in two words, and is also differently spelled, —in the one case with two "ys," and in the other with none. And it is insisted that this mode of writing the name to the will affords evidence in itself that it was not written by the testatrix, because not in the usual spelling and form of her signature. It is further contended that, aside from the peculiarity in spelling, the signature, when critically examined, appears to be a simulated signature, and two expert witnesses, Prof. D. T. Ames and Dr. Hagan, were called, and testified to that effect; and photographs of the recent signatures of the deceased and that to the will were produced in contrast for examination.

And further, in support of their contention that

the signature was never penned by the deceased, testimony was offered tending to show that, on several occasions after the date of the execution of the alleged will, both Mrs. Williams and Mrs. Carpenter denied that the will had been executed, or stated, in effect, that the deceased had made no will.

Upon the part of the proponent several papers and documents were produced, dated many years before her death, in which Mrs. Williams's name was written "Roxa L. Williams;" one of which, dated March 28, 1859, and purporting to be a conveyance of real estate by her to her brother, is signed "Roxa L. Williams." Another instrument, purporting to be a deed, said to have been executed by Mrs. Williams and her husband, dated February, 1847, the body of which appears to be in the handwriting of her husband, has her name written as one of the parties thereto (the Christian name) "Roxa Lana," in two words, although the name is signed by her in one word, "Roxalana." In another instrument, dated March, 1859, her name appears as grantee, in a deed from her brother, Jacob F. Hall, and is written "Roxa L. Williams." It also appeared that old silver spoons and towels and pillow-cases kept at the residence of deceased, and used by her, were marked with the letters "R. L. W." and "R. L. H." It is very apparent that Mrs. Williams, at an early period of her life, at times at least, wrote and recognized her Christian name as spelled in two separate words.

It further appears, from an examination of the will itself, that the name "Roxy Lany Williams," wherever it appears, which is at the commencement of the

will, and also in the attestation clause, is written in two words, and spelled precisely as it is spelled in the alleged subscription to the will. Mr. Snyder testifies that he so inserted it in the will because he found it written so upon the memorandum which was delivered to him for drafting the will. I am satisfied that, so far as the first branch of the contention of the contestants is concerned, namely, that the signature must be deemed a forgery, because spelled out of decedent's usual habit, cannot be sustained. It is quite conceivable that this old lady, who was executing a document (if she did execute it) of the solemnity of a will, after having read it over, as it is alleged, in the thirty minutes during which she had it in her possession, deemed it important that her name should be subscribed to the will as it was written. Indeed, it is quite natural, and the usual mode, for people, in subscribing formal instruments, to write their signatures in what they believe or understand to be their correct and original form, although not the form usually employed by them.

And, finally, it is quite unreasonable to believe that a person desirous of simulating the signature of the decedent would have written it in a form and mode of spelling so unlike the one commonly used by her. The proponent also produced a large number of expert witnesses, including Dr. Ward, a professional expert. But the greater number of the witnesses called by the proponent were cashiers and tellers of different banks in this city, who were accustomed to examine hundreds of signatures each day, and upon whose knowledge and skill in that department the safety

and credit of their several banks largely depend. These witnesses all testify that the signature to the will, notwithstanding its spelling and separation into two words, not found in the later signatures of Mrs. Williams, was unquestionably in her genuine handwriting. Upon the whole, I incline to the opinion, from a careful examination of the signature, in connection with the testimony and exhibits, that the signature to the will is genuine, and was written by Mrs. Williams. But beyond this, and entirely independent of this class of testimony, (expert,) is the testimony of the two subscribing witnesses to the will, both persons of intelligence, and whose reputation has been unassailed upon this hearing, and presumptively is unassailable, who both testify they saw Mrs. Williams affix her signature to the will; so that, upon the whole evidence, there cannot remain the slightest doubt upon the question of the genuineness of the signature to the will.

The remaining question, and the more serious one, is presented by the contestants' contention that this will was the result of undue influence or fraud, and not the free, spontaneous act of the testatrix. It is urged that Mrs. Williams was a person of great age, (eighty-two years old,) somewhat feeble in health, shut off from ready communication with the world by reason of her lost hearing, residing with her aged brother, who was himself an invalid, and by reason of his malady, (softening of the brain,) incapable of advising with her; that the memorandum for the will was prepared by Mrs. Carpenter, the principal beneficiary, without the presence or knowledge of any

other person, so far as appears; that there existed between the deceased and the principal beneficiary, as she admits and claims, the most tender relations, amounting almost to those between mother and daughter, which had existed for years, and grown closer as time progressed; that said beneficiary was not a relative either by blood or affinity; that the blood relatives, heirs at law, and next of kin of said deceased were not even mentioned in her will, and although the deceased had frequently said she expected a portion of the property would go to them; and, finally, that Mrs. Williams denied, as is alleged, after the making of said instrument, on one or more occasions, that she had made a will; that Mrs. Carpenter had also, on several occasions, made the same denial. These circumstances, it is claimed by the contestants, established that the alleged will, if executed, was the result of moral coercion amounting to fraud.

Upon the other hand, the proponent relies upon the general intelligence and capacity of the deceased; the absence of proof of impairment of memory, or of the exhibition of mental weakness or loss of will power; her full knowledge of her property, and of those upon whom she desired to bestow her bounty; the deliberation and care with which the act was done; the affection which prompted the act, and the absence of all proof of fraud and imposition,—to repel any and all presumption of undue influence.

Cases of this class have been before the courts so frequently that certain general rules have been established by which evidence of the character adduced

by contestants in this case should be weighed and applied.

The courts have also decided what kind and amount of countervailing evidence will avail to repel the presumption of fraud or undue influence raised by such evidence. The general rule as to the capacity and ability of a person to dispose of his property is as follows: Any person of sound mind, acting with full knowledge of his affairs, competent to understand his relations to those whom he chooses to benefit, may bestow his bounty as he likes, although the disposition may appear, and in fact be, unjust and inequitable. Clapp v. Fullerton, 34 *N. Y.* 190; Seguine v. Seguine, 4 *Abb. App. Dec.* 191; Coit v. Patchen, 77 *N. Y.* 533; Hollis v. Drew Theological Seminary, 95 *N. Y.* 166. The fact that a will disinherits testator's kindred is not alone evidence of undue influence; nor is the fact that the memorandum for the will is prepared by the person who is largely benefited under the will, and who is active in procuring its execution. Matter of Smith, *Id.* 516; Matter of Martin, 98 *N. Y.* 193; La Bau v. Vanderbilt, 3 *Redf. Sur.* 384; Cudney v. Cudney, 68 *N. Y.* 148. Neither is the fact that a will is not in accordance with testator's previously expressed intention, although it may have an important bearing in connection with other facts; but, without such facts of a pertinent and forcible character, a change in purpose of making a testamentary disposition does not invalidate the will. Matter of Phillips, 98 *N. Y.* 267. "There can be no fatally undue influence unless there is a person incapable of protecting himself, as well as a wrong-doer to be resisted;" in other

words, "it matters not how ingenious the fraud, or how coercive the influence, if there be intelligence enough to detect and strength enough to resist them." Schouler, Wills, p. 225; Shailer v. Bumstead, 99 *Mass.* 121. The proof of undue influence must be by direct affirmative evidence, or by such an array of circumstances as makes the inference of its exercise irresistible; in other words, the contestants must show facts utterly inconsistent with the hypothesis of the execution of the will by any other means than undue influence. Gardiner v. Gardiner, 34 *N. Y.* 155; Loder v. Whelpley, 111 *N. Y.* 239; Matter of Clausmann, 9 *St. Rep.* 182; Marx v. McGlynn, 88 *N. Y.* 357.

No presumption of testamentary incapacity arises from old age alone, Horn v. Pullman, 72 *N. Y.* 269; nor from deafness, Gombault v. Public Administrator, 4 *Bradf. Sur.* 226; and even feeble and weak-minded people may make valid wills, Matter of Gray's Will, 5 *N. Y. Supp.* 464; Matter of Gross, 14 *St. Rep.* 429. In fine, the rule to be deduced from the authorities may be stated as follows: Undue influence must be an influence exercised by coercion, imposition, or fraud, and not such as arises from gratitude, affection, or esteem, and its exertion upon the very act must be proved. It will not be inferred from interest and opportunity; and if, on the other hand, there is adduced proof of capacity, mature deliberation, settled purpose, and absence of fraud and imposition, the will must be deemed the exercise of personal right, and be respected accordingly. Let us apply these rules here.

The case for the contestants may be summarized as

follows: *First.* The will was that of an aged, feeble, and deaf person. *Second.* It disinherited her heirs, although she had expressed an intention or desire that they should have some of her property, and gave the property to a stranger in blood. *Third.* The memorandum was prepared by the principal beneficiary, between whom and the deceased had long existed the most friendly and even affectionate relations. *Fourth.* The alleged testatrix and beneficiary had each, as is alleged, stated upon occasions after the making of the will that no will had been made.

I will consider these in the inverse order of their statement. As to the alleged admissions of the testatrix and the principal beneficiary under the will, it may be stated that it is a well-settled rule that admissions of the alleged testatrix, not made at or about the time of execution of will, are not admissible, and cannot be received as a statement of facts upon the question of undue influence and fraud, although such admissions may be competent on the question of mental capacity, in connection with the charge of undue influence. Marx v. McGlynn, 4 *Redf. Sur.* 455, 88 *N. Y.* 357; Waterman v. Whitney, 11 *N. Y.* 166; Abb. Tr. Ev. 115.

It may be further stated that the alleged admission of Mrs. Carpenter that no will had been made to her knowledge is not, I am satisfied, she not being the sole beneficiary under the will, competent evidence upon any issue. So far, therefore, as these latter alleged admissions are concerned, they may be regarded under the authorities as immaterial in the decision of this case.

The charge that the memorandum was drawn, and the making of the will was procured, by the principal beneficiary, with whom the relations of the deceased were most intimate, presents the most serious question in the case, and the courts say, under such circumstances, it devolves upon the beneficiary to show that it was the free act of the mind of the testatrix. The proponent insists that this is conclusively shown in this case by the manner in which the will was prepared and executed. The alleged testatrix had indisputably the instrument in her possession, which was plainly written, for a half hour, and, after such opportunity to inform herself of its contents, she came in the presence of two persons who were in no wise related to her or Mrs. Carpenter, and stated that the will was all right, and just as she wanted it, and thereupon executed it, and declared it to be her last will and testament.

It must be conceded that, if deceased was of substantially unimpaired mind and memory, with such ample opportunity for knowledge and deliberation upon the contents of the alleged will, even if she had no prior knowledge, as was afforded in this case, the charge of implied fraud and imposition would not be sustained. As a further proof of decedent's intent to convey the bulk of her property to Mrs. Carpenter, the proponent points to the fact that, although the will gave the residue of the property to Mrs. Carpenter, yet, after the death of her brother, J. F. Hall, by which she became entitled to a large amount of personal property, in addition to a farm of 140 acres, her attention was called to the question that the will,

perhaps, did not carry the farm; that she then, in the presence of a stranger, after careful examination of the instrument, and pointing out an error in the name of the grantee, signed the deed of the farm; thus deliberately turning over the entire balance of her estate to the principal beneficiary in the will, thereby showing, as is alleged, that she must have understood and intended that Mrs. Carpenter should have her entire estate, with the exception of the small legacies given in the will. Upon the whole, it seems to me upon this point that the requirement of the law has been met, and that there has been shown knowledge, capacity, deliberation, and settled purpose in the disposal of the property, with an entire absence of any proof of fraud or imposition producing the result. The fact that the beneficiary communicated to the draughtsman a provision in her favor to be inserted in the will will not be sufficient to shift the burden, where the testatrix was intelligent and had personal knowledge of the contents of the will. Matter of Martin, 98 *N. Y.* 193.

Upon the question of the disinheritance of heirs, the same considerations above stated have equal application, to which must be added the additional consideration that the next of kin were cousins only, and lived in another state, and that there had been no intercourse between the families for years, except a visit and letters at very considerable intervals; while, on the other hand, Mrs. Carpenter was regarded by testatrix as a daughter, and the most ardent expressions of confidence and love were indulged in by Mrs. Williams respecting Mrs. Carpenter, which

were fully reciprocated on the part of Mrs. Carpenter, not so much by expressions as by care, attention, and kindness towards the deceased, which continued down to the last moment of her life.

It has been repeatedly held that an intelligent and deliberate testamentary disposition of property to strangers in blood, when prompted solely by gratitude, love, and affection, will not be set aside in favor of any presumed or even previously expressed intent of a testator not to disinherit his heirs.

The same general considerations will apply upon the question of decedent's age and infirmities; to which should be added the additional facts that the will was executed more than a year and a half before her death; that she was the administratrix of her brother's estate, and consequently knew the value and extent of his property, which constitutes the bulk of her estate; and, finally, was not without independent advisers as to the disposition of her property. If, therefore, she was of sound mind and memory, of which there is abundant evidence and substantially no countervailing proof, was able to know and retain in her mind the value and extent of her property and those who were or might be the proper objects of her bounty, and to choose intelligently between them, and, uninfluenced by fraud, did so choose, then, whatever her age or infirmities, or however completely she excluded her blood relatives from participation in her bounty, or however intimate her relations may have been with the principal beneficiary, or however great may have been the influence of the beneficiary, as the

result of kind offices and considerate treatment of deceased, the will must stand.

In conclusion, the evidence discloses a complete knowledge on the part of the testatrix of the contents of the will, ample deliberation, settled purpose, and a full legal capacity; and I fail to find from the evidence that the principal beneficiary, or any one in her interest, so controlled the action of the testatrix, either by importunity which she could not resist, or by deception, fraud, or other improper means, that she thereby procured the execution of this instrument.

The burden of establishing this was upon the contestants, and, they having failed in this, the will must be admitted to probate. Let a decree be so prepared.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—July, 1891.

MATTER OF WOLFE.

In the matter of the estate of CATHARINE L. WOLFE, *deceased*

In voluntary proceedings in New York county to appraise the estate of a decedent under the Collateral Inheritance Tax Act, Laws 1887, chap. 713, the comptroller of the city of New York is entitled to notice of the proceedings to appraise the estate under § 13, and the failure to give such notice renders the proceeding without jurisdiction and void as to the state.

The acceptance by the comptroller of the tax on some of the legacies in a proceeding in which he had had no notice of the appraisement, does not estop him or the state from collecting other taxes on other legacies,

under the same will, but which had been erroneously, and without notice to the comptroller declared to be exempt from the collateral inheritance tax.

The collateral inheritance tax is a tax upon the devolution or succession of property and not a tax upon the property itself, and therefore a proceeding to enforce it is not *in rem*.

Neither Grace Church, which is a religious corporation in New York city, organized under Laws 1801, chap. 79, and amendatory acts, nor the Metropolitan Museum of Art, incorporated under the Laws of 1870, chap. 197, which derives income from dues of members, sales of books, specimens, etc., and which gives to its members, certain privileges not shared in by the general public, is a free public charity, and therefore neither is exempt from the collateral inheritance tax.

The amendment to the Collateral Inheritance Tax Act, Laws of 1890, chap. 553, exempting certain religious, benevolent, etc., corporations from the operations of the collateral inheritance tax has not a retroactive effect.

An action to compel payment of the collateral inheritance tax is not an action for a penalty or forfeiture, (Code Civ., Proc., § 384,) which must be brought within two years after the cause of action has accrued.

Where executors have paid a legacy in good faith after a decree of the Surrogate that such legacy is not subject to the Collateral Inheritance Tax Act, which decree is not binding on the state, for the reason that the comptroller was not made party to the proceedings for the appraisement, the executors will not be held personally liable for the amount of such tax paid by them, even if there should be a subsequent adjudication that the legacy so paid by them was subject to the tax.

In such case the legatees are liable for the amount of the tax.

PROCEEDINGS by the district attorney of New York county to compel payment by legatees under the will of Catharine L. Wolfe, deceased, of the collateral inheritance tax, and to impose a personal liability for such payment, under the statute, upon the executors of the will of testatrix.

The facts appear in the opinion of the referee, James W. Perry, Esq., and which was adopted by the Surrogate.

BENJAMIN F. DOS PASSOS, *for petitioner.*

JOHN M. BOWERS, *for executors.*

MATTER OF WOLFE.

EVARTS, CHOATE *and* BEAMAN, *for* METROPOLITAN MUSEUM OF ART.

STEPHEN P. NASH, *for* GRACE CHURCH.

(Opinion of James W. Perry, referee.)

THE REFEREE.—This is a proceeding instituted by the district attorney of the county of New York on his petition, claiming to represent the people of the state of New York, to compel the payment of the tax claimed to be due, unpaid, and imposed upon certain legacies made in the will and codicil of said Catharine L. Wolfe, deceased, under the provisions of chapter 483 of the Laws of this state, passed June 10, 1885, entitled "An act to tax gifts, legacies, and collateral inheritances in certain cases," and chapter 713 of the Laws of 1887, amending the same; the authority in law for this proceeding being especially under section 17 of this act. It was brought by such district attorney, after having received notice from the comptroller of the city of New York that he had reason to believe that the tax in question was due and unpaid, and that the persons interested in such legacies had refused and neglected to pay the tax lawfully imposed and accruing thereon.

The particular legacies or gifts upon which the petitioner claims a tax is now due and unpaid, by force of the provisions of said act, are given by the sixth clause or paragraph of the last will and testament, and the codicil thereto, of said decedent. The said Catharine Lorillard Wolfe died in the city of New York on or about the 4th day of April, 1887, leaving a last will and testament, and the codicil thereto, which was duly admitted to probate by the Surrogate of New

York county. Letters testamentary were issued to David Wolfe Bruce, David Wolfe Bishop, and Louise L. Lorillard, who qualified as executors of her said will. They, together with the legatees in question, are the respondents in these proceedings. By the sixth clause or subdivision of her said will, said decedent gave to the Metropolitan Museum of Art, a corporation chartered under chapter 197 of the Laws of 1870 of the state of New York, "my entire collection of modern oil paintings, with their frames, and also my water-color drawings, with their frames, which paintings include the original portrait of my late father, John David Wolfe, by Huntington, and my own portrait, by Alexander Cabanel," to be delivered under certain conditions, by her executors, to said Metropolitan Museum of Art within six months after her decease. This collection of paintings was to be known as the "Catharine Wolfe Collection."

And, in order to provide for the better preservation of said paintings and drawings, and the future increase of said collection, the said decedent, by the same clause of her will, gave to her executors the sum of $200,000 in money, (or in stocks and securities deemed by them to be of that value,) upon the trust to hold and invest the same in securities of the United States or bonds in good credit, and to apply the net amount of said income to the use of the said Metropolitan Museum of Art during the lives of two of her said executors, in such judicious repairs of such works of art as may be necessary, and any surplus to be expended in the purchase of other original, modern oil paintings, etc. And if the said Metropolitan Museum of Art should

acquire the legal right to hold such fund in perpetuity upon the trust and for the purposes in said bequest expressed, then, in such event, it was made the duty of her said executors to pay over such fund to said institution on the same trusts, to be held in perpetuity for the purposes aforesaid; but, in the event that said institution shall not acquire power and authority under the laws to hold such fund on such trusts, then, upon the death of the survivor of said two last-named executors, said principal fund shall belong to and be paid or delivered to said institution, to be applied by it as fully as may be to the purposes in said will expressed.

By the codicil to her said will, dated March 24, 1885, said decedent revoked and annulled the entire sixteenth section of her said will, and in lieu of the bequest therein gave and bequeathed the sum of $350,000 to the Rector, Wardens, and Vestrymen of Grace Church, in the city of New York, in their corporate capacity, upon the trusts therein named, generally being to keep the same safely invested, and to receive and apply the income thereof to the maintenance, improvement, and decoration of the present Grace Church edifice, in the city of New York, and the two adjoining buildings erected by decedent in memory of her father, and known as "Grace Church Chantry," and "Grace House," "and especially to promote, continue, and perpetuate the observance of religious worship and instruction, according to the rites, in their purity, of the Protestant Episcopal Church of America, at or in said buildings, or any that may be erected there in the place thereof," etc.

These, then, are the two legacies or gifts upon which the petitioner claims a tax is imposed under said act, and which is due and unpaid, which may be summarized as: (1) A gift or legacy to the Metropolitan Museum of Art, in New York city, of the decedent's entire collection of oil paintings and water-color drawings, upwards of an hundred in number, together with a fund of $200,000, to keep the same in repair, and for the purchase of works of merit of modern artists, in addition thereto. (2) A gift or legacy of $350,000 to the Rector, Wardens, and Vestrymen of Grace Church, in the city of New York, for the church purposes of such religious corporation.

The petitioner, as representing the people of the state of New York, claims that neither the state, the comptroller, nor district attorney ever received notice of any appraisement of such legacies; that it was entitled to such notice; that the tax upon said gifts or legacies lawfully imposed by the said statute has never been paid and is now due. The petitioner seeks by these proceedings to assess and collect the same. The executors and the Metropolitan Museum of Art and Grace Church, the legatees in question, claim that due proceedings were had for the assessment of the tax upon such legacies under such statute; that the same were declared by the Surrogate to be exempt from taxation under the order or assessment duly made on October 29, 1887; that no appeal was ever taken by the comptroller or state from such order or decree; and that the state is now estopped by said order, and cannot maintain these proceedings. In addition, the executors claim that they paid and delivered these

two separate legacies, not until after they had been adjudged exempt by the decree or order of Surrogate ROLLINS of October 29, 1887; that they did so in good faith, and, whether such legacies are now taxable or exempt, they are not personally liable. In this situation of affairs, the Surrogate before whom these proceedings were inaugurated has referred this matter to me to take the evidence produced by the respective parties hereto, upon the issues formed by the petition, answers, and reply herein. I have taken all the testimony, and received as well all of the records in this proceeding, offered by any party, that seemed in any respect, however remote, to bear upon the questions here involved. The facts upon which this proceeding is based are not really or in any substantial sense disputed. The questions at issue are those of law upon facts which, for the purpose of this discussion, may be deemed admitted. These questions are, however, interesting and novel, and practically are upon the construction of the statute referred to, which, in certain of its provisions, at least indefinite and uncertain.

The facts, in addition to those already stated, are that on June 2, 1887, the executors of said decedent, by petition, applied to the Surrogate of the county of New York for the appointment of an appraiser, in order that an appraisement might be made, and the amount of the tax, under the provisions of said collateral inheritance tax act, be ascertained and declared. On the same day, the Surrogate, without notice, appointed one James M. Jackson such appraiser. On June 23d a supplemental petition of said executor was filed, stating that the above order appointing the ap-

praiser did not prescribe notice to be given of such appraisement to the parties interested, and praying that an order be made fixing a reasonable time for notice to be given by the said appraiser to all parties interested in the real and personal property of said decedent. On June 24, 1887, an order of the Surrogate was entered on such petition, providing for notice to certain legatees of an appraisement of said decedent's estate not already appraised. This order, however, as did the previous order, provided for no notice to the comptroller. Thereupon the said named appraiser, without having given any notice of such appraisement to the comptroller or to any person or official representing the state, proceeded to appraise the estate in question. On August 10th the appraiser filed his report. Nowhere in the report, nor in his affidavit attached, does it appear that he mailed notice of such appraisement to the comptroller of the city of New York. Nor, as a matter of fact, was he so notified, nor did he know of such appraisement. On August 27, 1887, an order was made by the Surrogate confirming the report of said appraiser, without notice to the comptroller or other official, nor was he heard or notified of the application for such order. This order, however, contained the following clause: "And all questions as to the liability to taxation, and the value for that purpose of property not herein assessed, including the estimated deduction from the residuary estate for compensation to the executors for making divisions or otherwise disposing of the real estate, as to which certain powers are conferred upon them, are hereby reserved for further consideration upon the

15th day of September, 1887, at 11 o'clock in the forenoon, at the Surrogate's Court, in the court-house in the city of New York, which time and place are hereby assigned for a hearing upon the following questions, viz.: Why the property disposed of in clauses 5, 6, 12, 17, and 18 of the will of said Catharine Lorillard Wolfe, and in the codicil to said will, should not be valued and assessed for taxation under such act," etc.

It will be noticed that the question as to whether particular legacies or gifts sought to be taxed under these proceedings were lawfully liable to be taxed, are specially reserved for a hearing before the Surrogate at the time designated in said order. On the 3d day of September, 1887, the executors, through their attorneys, caused a copy of such order to be mailed to the comptroller, together with a copy of the appraiser's report, and a notice that the questions reserved would be heard at the time designated in such order. Up to this time the comptroller had been wholly ignored in the entire proceedings, and, indeed, it would seem to have been the purpose of the executors to give no notice whatever to the comptroller or other official representing the state, since it was only upon the suggestion of the Surrogate that the comptroller was inserted in the notice as a party after the appraisement had been completed and confirmed. This was the first notice received or given the comptroller of any proceedings in this estate to assess the tax upon the various legacies and gifts made in the will of decedent, under the provisions of said act. On the 6th day of September, one of the assistants to the Surrogate served upon the comptroller a certi-

fied copy of the order last mentioned. This is the first notice that the comptroller appears to have actually received of the proceedings to tax the legacies herein, although, for the purpose of this discussion, he may be deemed to have received the notice mailed to him on the 3d inst. by said executors. At the hearing specified in said order, on September 15, 1887, the comptroller did not appear, and was not heard; nor did the district attorney appear on such hearing, nor was he ever notified of any proceedings in this estate, until he was informed that the tax herein had not been paid, upon which he instituted these proceedings. On the 29th day of October, 1887, the Surrogate made an order herein exempting the legacies given to the Metropolitan Museum of Art, and to the Rector, Wardens, and Vestrymen of Grace Church, from taxation under said act. It does not appear that this order of October 29, 1887, was ever served upon the comptroller, or that he received notice of its entry. As a matter of fact, the legacies to Grace Church of a bust of Bishop Potter, contained in the fifth section of said will, and of a pew in Grace Church and St. Paul's Church, contained in the eighteenth section of said will, given to said church corporations, and the legacy of the collection of oil paintings, water colors, etc., upwards of 100 in number, given to the Metropolitan Museum of Art, under the sixth section of said will, (the latter being one of those in question,) were never appraised by the said appraiser, and their fair market value never ascertained; and they are nowhere mentioned in the appraiser's report. These are all the facts that are material to this discussion. I have been

thus full and explicit, so that the entire facts that in any manner influence or control the determination of the question under consideration might be fully stated.

The first question that presents itself for consideration is, is the comptroller entitled to notice of appraisement, as an interested party, and is he entitled to a hearing before the appraiser as to the value of the property sought to be assessed? The comptroller is the collecting officer representing the state on the appraisement of the property, the assessment and collection of such tax, at least in voluntary proceedings instituted by the executors. As the rate of the tax only is fixed by law, the amount of such tax is necessarily determined by the value placed upon the property by the appraiser. Necessarily, therefore, it would seem that the comptroller, representing the state, was an interested party upon the appraisal, where the sole question to be determined is: What is the fair market value of the legacies claimed to be liable for such tax? and that he is a necessary party to the validity of such proceedings. It was plainly the duty of the appraiser to mail a notice of appraisal of these legacies to the comptroller, upon which appraisal he had the right to be heard. He was not so notified. Nor did he know of such appraisal until after the same had been made and completed, and the appraiser's report confirmed in all respects, excepting as to the questions reserved. I do not understand that it is any part of the duty of an appraiser under this act to declare whether any legacy is exempt or not, his duty being simply, after giving the notice required by law, to ascertain the fair market value of

the legacy, and report the same in writing to the Surrogate, who thereupon assesses the tax thereon. In this case, however, the appraiser in his report did declare the legacies in question exempt from taxation. Matter of Astor, 6 *Dem.* 413; Matter of Vanderbilt's Estate, 2 *Conn. Surr. Rep.* 319. However that may be, since the comptroller here was given no notice of the appraisal of the estate of decedent, I have no difficulty in reaching the determination, on the authority of the following case, that the comptroller was not bound by such appraisal, and that the proceedings thereunder were without jurisdiction, and void as to the state. As far as the rights of the petitioner representing the people are concerned, it is the same as if such appraisal was never had. This clearly seems to be the conclusion in the following case, where the constitutionality of the various provisions of the act were under discussion, and EARL, J., writing the opinion of the court, referring to this act, says: "Therefore, when the section provides that he shall designate by order to whom the notice is to be given, it is necessarily implied that he shall designate all persons entitled to notice. If he should omit to do so, it would be an error on account of which any tax imposed upon the person not notified or heard would be invalid, as having been imposed without jurisdiction." Matter of McPherson, 104 *N. Y.* 322. So, also, *In re* Vanderbilt's Estate, *supra*, which in many respects was a proceeding similar in its circumstances to this. The Surrogate, in citing the foregoing case, said: "No notice of appraisement was ever given to the comptroller or district attorney, or to the institutions now

sought to be subjected to the tax. It is clear that each were entitled to such notice." The comptroller, then, being a party in interest, therefore a necessary party, and not having been notified nor heard on the appraisal, as provided by section 13 of the act, it inevitably follows that the appraisal was invalid and without jurisdiction as to the state, of which he was the collecting agent in such voluntary proceedings. But it is urged by the executors and legatees that, even if the comptroller did not receive notice of, and did not have a hearing upon, the appraisal, he did have notice of a hearing upon the questions reserved by the Surrogate for his determination, which included the questions of liability to taxation of the legacies here under consideration; that such notice was contained in the order of the Surrogate of August 27, 1887, confirming the report of the appraiser, except as to certain legacies, including these, and which designated September 15, 1885, as the time when the hearing would be had upon such reserved questions; that this order containing such notice was served upon the comptroller on the 3d and 6th of September, 1887; that he had an opportunity then to be heard upon these questions, and, if he did not choose to avail himself of it, he had his day in court, if he desired it, and is now estopped from questioning such proceedings, and therefore bound by the order of the Surrogate of October 29, 1885, exempting these legacies from taxation upon such hearing. This contention of the executors and legatees seems to ignore the certain right of the state to be heard upon the question of the fair market value of the legacies. That question had al-

ready been determined without notice. The Surrogate has no authority, under the statute, to fix the market value of the legacy. He is the assessing officer, and upon the report of the appraiser assesses the tax, and determines whether the legacy is exempt, or liable for the payment of the tax. I am not unmindful here that it may be said that the legacy to Grace Church and part of that to the Metropolitan Museum of Art (if it can be separated) are each money legacies, and so, perhaps, needed no appraisal as to the market value. An examination of section 13 of the statute plainly shows that the appointment of the appraiser and his appraisal are the initial steps in the proceedings to ascertain the liability of estates to taxation, and not until such proceedings are had does the matter come before the Surrogate for his assessment. That was done in this case. If, then, the initial proceedings were invalid and without jurisdiction, it is difficult to see how any subsequent proceedings, based upon the invalid and void proceeding, can become valid and binding upon any person as to whom the prior proceedings were without jurisdiction. If the appraisal was invalid as to the comptroller as the receiving or collecting agent of the state, certainly no assessment based upon the appraisal can be binding or conclusive on him. It can only conclude those whom the appraisal concludes; that is, those parties in interest who had due notice of the appraisal.

I do not think that the Surrogate has any jurisdiction to make an assessment upon an invalid and void report of an appraiser; and, if such an assessment is made, it also is invalid and void. In other words, if the pro-

ceedings are without jurisdiction from the beginning, all subsequent proceedings are equally so, unless the want of jurisdiction is waived. No waiver has ever been made by the state here.

Another ground of estoppel made against the petitioner by the respondents is that the comptroller accepted payment of taxes upon certain gifts or legacies other than those in question assessed by the order of August 27th. I do not see that this affects the position of the petioner at all. The legacies were separate and distinct from those here, and taken by different legatees, and, as the comptroller ascertained the correctness of the assessment made, he might well accept the payment of the tax properly assessed thereon, without destroying his rights, or imperiling those of the state, to collect other taxes or other legacies, to impose a tax upon which no due proceedings in law had yet been had. But not even these grounds of objection, with which I do not agree, and against which I decide, can be made against the legacy of oil paintings, water colors, their frames, etc., upwards of a hundred in number, given to the Metropolitan Museum of Art. This collection of paintings and water colors, their frames, etc., have never been appraised at all. Its fair market value has never been ascertained nor reported to the Surrogate, nor has he made any assessment thereof upon any report. Certainly, as to this collection of paintings and water-color drawings, and their frames, an appraisement must be had, and an assessment made thereon. Upon this branch of the question, therefore, I conclude that the previous proceedings for the purpose of assessing

the tax under said act were without jurisdiction as to the comptroller, and do not estop or conclude him or the state in these proceedings. The rights of the state to collect the tax on such legacies, under such act, are unaffected by such prior proceedings.

I have carefully considered another reason why the state is not estopped by the prior proceeding, which has been presented to me with much force and ability by the counsel representing the state; that is, that the plea of former adjudication cannot avail here, because neither the parties to the proceeding nor the subject-matter, remedy, or cause of action is the same, and that, for such plea to prevail, the two proceedings must be identical in all these particulars. In other words, that the former proceeding, under section 13, was purely an assessment proceeding, in which no liability could be enforced; that the present proceeding is one instituted under sections 16 and 17, by the district attorney representing the state, to impose the liability and compel the payment of the tax; that the comptroller does not represent the state so as to conclude it, but that the state can only be bound on notice to the district attorney, as its representative official, who could only move in a proceeding such as this after the expiration of eighteen months after the tax became due, and is not a proper party, and cannot intervene in the proceedings, under section 13 of the act. Matter of Arnett, 49 *Hun* 599; Matter of Vanderbilt's Estate, 2 *Conn. Surr. Rep.* 319; Matter of Astor, 6 *Dem.* 402; Matter of Farley, 15 *N. Y. St. Rep.* 727. In view, however, of the conclusions I have reached as to the effect of the failure to properly notify the comptroller,

I do not deem it necessary to pass upon these views of the district attorney and counsel for the state. I prefer to place my conclusions upon the ground of failure to notify the comptroller in the manner required by law. It is clear that the comptroller is the receiving or collecting officer of the state of the taxes assessed under this act. He is its agent, and represents it. And it seems to me that, if due and proper notice was given to the comptroller of the proceedings for the appraisal, assessment, and collection of such tax, the state would be concluded thereby. That being so, the conclusion is inevitable that he does represent the state, at least in voluntary proceedings instituted by the executors.

The contention, however, is made by the executors and legatees that, whether the comptroller was duly notified or not of the former proceedings, the decree of October 29th is nevertheless conclusive upon the state, for the reason that the Surrogate is made the assessing and taxing officer by the provisions of such act; and the proceedings are *in rem;* and that, such assessment having once been made, it is valid and effectual for all time, and no re-assessment can be had. Of course, even if this view was sound, it goes without saying that it would not affect the question here as to the gift of the valuable collections of paintings, water colors, etc., to the Metropolitan Museum of Art, because no appraisal or assessment of them has ever been made or claimed to be. My conclusion upon this phase of the question is that the Surrogate is the assessing or taxing officer; but that the assessment made by him must, to be effectual and valid, be made

upon an appraiser's report, made in due form of law, and in the special manner provided by this statute to bring the parties to be concluded by the assessment within the grasp of its jurisdiction. If the procedure of the statute is not followed, necessarily the proceedings fail, as being without jurisdiction.

It is a well-settled rule of law that, where a statute gives a new power, and prescribes the manner and means of enforcing it, the proceedings under it can be had in no other way than those distinctly specified in the act. A special law giving special proceedings must be strictly followed. Apply that rule to the case here being considered, and the conclusion is easy that the entire former proceeding was without jurisdiction and invalid, so far as any force binding upon the state can be therein found.

But I cannot agree with the proposition of the respondents that this is a proceeding *in rem*. It is settled law, long since passed from the realm of doubt and debate, that this tax is one upon the legatee for the privilege of receiving it, and is not one upon the property itself. It is rather a tax upon the devolution or succession of property, and has so been determined in several well-adjudicated cases. My duty in this particular is satisfied by referring to the following cases, which decide that question adversely to respondents' position: Matter of Howard, 5 *Dem.* 483; Wallace v. Myers, 38 *Fed. Rep.* 184; Matter of Vanderbilt's Estate, 2 *Conn. Surr. Rep.* 319; Matter of McPherson, 104 *N. Y.* 306.

This brings us to the main question in controversy, as to whether the legacies in question, or the legatees

receiving them, are exempt or liable to taxation, under the provisions of the Collateral Inheritance Act. Upon the general question of the liability of these two institutions to taxation upon legacies received under this act, there can be no doubt, in view of the decisions upon this subject as they now stand. Grace Church is a religious corporation organized under the general act for the incorporation of certain religious societies, (chapter 79, Laws 1801,) and the several acts amendatory thereof. It derives an income from certain sources. It is not a corporation that dispenses a free public charity, whose benefits and privileges are free to all. This removes it from the domain of a free public charity. The Metropolitan Museum of Art is incorporated under chapter 197 of the Laws of 1870. It derives an income from various sources,—from dues of membership, sale of books and specimens, etc. Its privileges and advantages are not free to the general public, but special privileges are given to its members and others on special occasions, to the exclusion of the general public. Neither of these two institutions is exempt from taxation by any provision of law. I need not consider the liability of these two corporations to taxation under the act. That question has been decided. It is sufficient for me to say that both of such corporations are liable to taxation, and to cite as authority therefor the cases of Catlin v. Trustees of Trinity College, 113 *N. Y.* 133; Matter of Vanderbilt's Estate, *supra*, and the statutes there cited.

The counsel for these two institutions, however, claim that, even if they were liable for taxation upon

legacies by the provisions of the Collateral Inheritance Tax Act, they are specially exempted from such tax by the provisions of chapter 553 of the Laws of 1890. This position is not tenable. The act appealed to is not retroactive, and cannot disturb vested rights. If these two institutions at any time become liable to such tax which became fixed, and thereby a right vested in the state to assess and collect the same, certainly no subsequent act of the legislature can divest such right. We are not called upon, however, to give this question any further consideration. This question has been decided in at least two well-considered opinions, in which it is specifically held that such act was not retroactive in its operation. Sherrill v. Christ Church, 121 *N. Y.* 701, and Estate of Minturn, 15 *N. Y. Supp.* 547, n.

A further contention is made by the respondents that this is an action to recover a statutory penalty or forfeiture, and must be brought within two years after the cause of action accrues, under the provisions of section 384 of the Code of Civil Procedure. I am unable to agree with this interpretation of the law on this subject. However, this question has also been decided adversely to the respondents' position. Matter of Vanderbilt's Estate, 2 *Conn. Surr. Rep.* 319.

The executors in this proceeding have paid over and delivered to the two institutions named the legacies bequeathed to them under the will of said decedent. This they did after the making and entry of the decree of the Surrogate of October 29, 1887, declaring each of said legacies exempt from taxation. The district attorney, on behalf of the state, raises

what to my mind is a serious question, that of the personal liability of the executors for the payment of the amount of the tax upon such legacies. I have carefully considered the brief of the counsel for the petitioner upon the question, and have given the subject much independent examination. My conclusion, however, is that the executors having acted in good faith in paying such legacies, apparently relying upon the decree or order of October 29, 1887, they are not personally liable for such tax. The learned Surrogate has decided that under such circumstances as here the executors are not personally liable for such tax. Matter of Vanderbilt's Estate, *supra*.

My conclusion, therefore, is that with respect to the people of the state of New York no due and lawful proceedings have been had for the appraisement and assessment of the tax upon said legacies to the Metropolitan Museum of Art, or to the Rector, Wardens, and Vestrymen of Grace Church, pursuant to the provisions of said act; that said legatees are liable for any tax imposed under said act upon said legacies, or for the privilege of taking and receiving the same; that such tax is due and unpaid; that the executors of decedent having paid such legacies to the said named legatees in good faith, and not until after the entry of the decree of October 29, 1887, are not personally liable for said tax; that the question of the fair market value of the legacy of the collection of oil paintings, water colors, and their frames, etc., has never been determined, such legacy having never been appraised by any appraiser, nor assessed by the Surrogate; and, finally, that said gifts or legacies should be appraised,

and the tax imposed by said statute assessed thereon for the amount of which said legatees should be declared and held liable.

Upon the filing of the report of the referee the Surrogate wrote the following opinion:

THE SURROGATE.—All the questions raised by learned counsel for all the exceptants have heretofore been carefully considered by me in other cases, and upon further reflection, aided by elaborate and able briefs now submitted, I am confident that my previous rulings are sound. I concur in the findings and conclusions of the learned referee, and adopt his able opinion as expressing my own views upon the questions involved. An appraiser must be appointed pursuant to settled practice, to ascertain the fair market value of the legacies in question.

RENSSELAER COUNTY.—HON. JAMES LANSING, Surrogate.—July, 1891.

MATTER OF COZZENS.

In the matter of the judicial settlement of the account of GEORGE B. SMITH, JESSE B. ANTHONY *and* THEODORE E. HASLEHURST, *executors of and trustees under the will of* GORTON P. COZZENS, *deceased.*

Three persons, A. H. and S., who were executors in and trustees under a will, qualified, but only two of them, H. and S., took any active part in the management of the estate, dividing the assets of the estate between them and receiving the income. H. kept the books of the estate, entering thereon all the receipts and disbursements made by himself as well as those reported to him by S., and he made periodical statements from such books to S., who disbursed the income of the entire estate to and for the benefit of the beneficiary. H. died insolvent, and it was found had appropriated to his own use part of the assets of the estate. *Held*, that neither of the other trustees was guilty of negligence in not examining the books of the estate kept by H., and were therefore not liable for the amount misappropriated, without their knowledge, by the trustee, H.

Executors and trustees under a will, who loan to one of their number assets of the estate on his personal note, secured by collateral of a railroad bond, are liable to the estate for the loss caused by the insolvency of the maker of the note, and the fact that the said maker had no title to the bond which he had pledged as security.

ACCOUNTING by George B. Smith, Jesse B. Anthony and Theodore E. Haslehurst, under the will of Gorton P. Cozzens, deceased.

The facts appear in the opinion of the Surrogate.

MERRITT & RYAN, *for* GEORGE B. SMITH *and others, trustees.*

MATTER OF COZZENS.

SEYMOUR VAN STANVOORD, *guardian ad litem, for* ANNIE S. COZZINS.

THE SURROGATE.—We shall consider, first, the propriety of the allowance of the credit of the sum of $2,060.67 upon this accounting. It will be necessary briefly to consider the facts connected with the alleged loss of the funds, in order to make a proper application of the law. But little, if anything, is known in regard to the actual facts connected with the loss, save what appears in the books kept by the deceased trustee, Haslehurst, which were not examined until after his death. From those books it appears that a mortgage upon property in the city of Troy was given by one Golden, for the sum of $2,000, September 10, 1884; that it was paid on the 10th day of September, 1886, in full. The mortgage was satisfied by Haslehurst alone, and the money never came into the hands of the trustees Smith or Anthony, and they had no knowledge of its payment at the time it was paid. On the books kept by Haslehurst the amount due on the mortgage, after it was received, was figured as cash in the hands of Cipperly, Cole & Haslehurst, bankers and brokers, at Troy, N. Y., of which firm Haslehurst was a member. Haslehurst paid interest thereon December 1, 1886, at 4 per cent, and subsequently entered in his book, January 1, 1887, that he had a balance on hand belonging to the estate of $3,060, including the $2,000 above stated. This amount he entered on the books as being on special deposit with Cipperly, Cole & Haslehurst, ($3,000,) and credited interest thereon for four months at 4 per cent. On November 1, 1887, Haslehurst changes again the entry on the book, by crediting interest

from Cipperly, Cole & Haslehurst on $1,000 at 4 per cent, and on $2,000 for six months at 5 per cent. It appears from the books that this $2,000 was simply Haslehurst's individual note, which never has been found, and probably was never made. The proceeds of the Golden mortgage never, so far as it appears, went to the firm of Cipperly, Cole & Haslehurst, but were used by Haslehurst individually, which amount constitutes a part of the shortage of this estate. Haslehurst credits himself with interest on this note up to the last interest day preceding his death. Anthony was never consulted about the Golden mortgage, and never knew it was paid, or even of its existence, until he made an examination of the books after the death of Haslehurst. Smith knew of the existence of the Golden mortgage, but had no knowledge, until after the death of Haslehurst, that it had been paid. The loan appears to have been made by Haslehurst alone. Smith only knew of it as interest was brought to him purporting to be interest received from the Golden mortgage. Under these facts the question arises, are Anthony and Smith, or either of them, liable for the loss which has occurred to the trust fund?

In regard to Anthony, we think there is no serious question as to his liability. He appears to have been a consulting trustee only. He had no charge of the funds, no knowledge of the investments; indeed there was a tacit understanding, as he alleges, between himself and the remaining trustees, that they would assume the active care and management of the estate.

In regard to Smith, the case is somewhat different.

He knew of the investment, and had active charge, in connection with Haslehurst, of the trust, and held a large portion of the securities in his own hand, and collected the interest and income from the securities and disbursed the income from the entire estate to and for the benefit of the beneficiary. He was a butcher, actively engaged in his business, unaccustomed to keep books of account save a simple blotter, and relied upon Haslehurst as a skilled accountant and one peculiarly qualified for the purpose of keeping the accounts and transactions of the estate. Doubtless he had access to the books of the estate kept by Haslehurst, but he did not in fact examine them. It inferentially appears that he would have known but little of them had he examined them, and really the only question, it seems to me, so far as this item is concerned, is: Were he and his co-trustee, or either of them, guilty of negligence in not examining the books of the estate kept by Haslehurst, or causing them to be examined, to learn, as it has been learned since Haslehurst's death, and might have been before, that Haslehurst was using the funds of the estate in his own business or the business of the concern of which he was a member?

The general rule in regard to the liability of executors and trustees is well settled. Co-executors and trustees may act either separately or in conjunction. They are jointly liable for joint acts, and each is separately liable for his separate acts and defaults. Bruen v. Gillet, 115 *N. Y.* 10; Croft v. Williams, 88 *N. Y.* 384; Adair v. Brimmer, 74 *N. Y.* 539. In Croft v. Williams, Judge FINCH, speaking for the court,

remarks that "the general rule is that an executor is responsible for his own acts, and not for those of his associates; so that, if he receives and misapplies the money, or does any act by which it gets into the hands of the other, who diverts or wastes it, and but for which act the latter would not have had it, a liability to make good the loss results. . . . . If an executor is merely passive, and simply does not obstruct the collection or receipt of assets, he is not liable for the latter's waste, but where he knows and assents to such misapplication, or negligently suffers his co-executor to receive and waste the estate when he has the means of preventing it by proper care, he becomes liable for the resulting loss. . . . . Mere assent to the executor's receipt of the funds is not enough. . . . . Ordinarily, in the collection of assets the rights of each are alike, and one has not control or supremacy over the other. One, therefore, may sit passive and see the other receive funds of the estate, and, making no objections, be deemed to assent, but that does not make him responsible for what has been received. He must in some manner know and assent to the misapplication; he must be a consenting party to the waste, or neglect some duty consequent upon his knowledge of the misapplication intended or in progress. A wrong done or duty omitted must lie at the foundation of his liability." See, also, Wilmerding v. McKesson, 103 *N. Y.* 329; Ormiston v. Olcott, 84 *N. Y.* 339.

In applying the rule above laid down to the facts relating to this item, it seems to me that Smith, whose liability is more especially insisted upon, is not guilty

of such negligence as renders him responsible for this loss. He certainly had no knowledge of the intended misappropriation, or of its progress, and had no reason to suspect Mr. Haslehurst's integrity, either from his standing in the community or from his own dealings with him. Neither does the rule that the knowledge of one co-executor or trustee must be imputed to the other laid down in the case of Troy & Albia-Horse R. R. Co. v. Smith, 11 *N. Y. Supp.* 261; 33 St. Rep. 203, apply here; otherwise in every case the actual non-consenting and innocent co-executor would always be bound for the wrongful acts of a recusant executor, because he would always, under that rule, have implied knowledge or notice of his co-executor's defaults intended or in progress.

The serious question is, was knowledge of the facts embraced in the books of the estate kept by Haslehurst legally imputable to Smith and Anthony, or either of them? We are not disposed to adopt so stringent a rule. There was no suspicion of wrong-doing, nothing to put the accounting executors on inquiry; and, under such circumstances, it can hardly be said that they were guilty of neglect in not looking into the books kept by the co-executor, or inquiring into the condition of the portion of the estate controlled by him, when they had every reason to believe that the duties which had been assumed by their co-executor were being properly performed.

We do not think the case of Earle v. Earle, 93 *N. Y.* 104, which holds that executors or administrators who permit a third person to manage and control the estate, and adopt him as their agent, are responsible

for his conduct, and are liable for losses incurred by his improper and negligent management of the affairs of the estate, applies here. In the case at bar Haslehurst was but performing his own duties as executor in what he did in keeping the books, and the fact that the remaining executors or trustees trusted to his honesty in keeping them correctly, and did not inquire into every transaction which was or might have been on his books, does not, as a matter of law or fact, require the conclusion that they were guilty of negligence; and we shall hold, for the purpose of this accounting, that the trustees should have credit for the sum of $2,060.67, lost through the misconduct of their associate trustee without their fault.

The remaining question, as to the credit claimed by the executors for the loss of $900 and the costs of a suit respecting the same, presents a far different question. Said $900 was a portion of the funds of the estate which had been received by the said Haslehurst, and also misappropriated by him. The facts in regard to that item are, in short, as follows: Haslehurst had received the money which belonged to the estate; and, to use the language of Mr. Smith, trustee, in his testimony, Haslehurst said: "'I (Haslehurst) will take that money, and give you my note and a Troy & Albia bond as collateral; that is, $900.' That is the only transaction he consulted me about. He said: 'I'll give you my note, and attach a bond of the Troy & Albia Horse-Railroad to it as collateral security.'" It appeared after the death of Haslehurst that the $1,000 bond attached to the note as collateral had been wrongfully taken by Haslehurst from its

owner when he transferred the same to Smith. The note is unpaid by reason of Haslehurst's insolvency. An action was subsequently brought by the Troy & Albia Horse-Railroad Company against the present trustees to recover the bond, and recovery was had, the court holding that the remaining executors or trustees were not *bona fide* holders of the bond, and that the knowledge of Haslehurst was imputable to them. Troy & Albia-Horse R. R. Co. v. Smith, *supra*.

Credit upon account of this loss is claimed upon the ground that Haslehurst, at the time of the acceptance of this note by Smith, his co-executor, had the money in his possession, and had the right to its control and use, and that Smith did nothing that caused the loss; and, further, that Smith neither put it in Haslehurst's possession, nor had he the power to deprive him of its possession, or control; and that at the time of the alleged loan he held it as trustee, and was entitled to its control, without consent of his co-trustee; and beyond that, that the trustee Smith acted in entire good faith in making the loan and accepting the bond of the Troy & Albia Horse-Railroad Company, which, it is alleged, was ample security for the loan; and except for the defect in title of the bond of which Smith, it is conceded, had in fact no knowledge, the loan would have been amply secured. We are of the opinion that this position is unsound. True, Haslehurst had the funds in his possession, but, for the occasion, he laid aside his character of co-executor or trustee, and went to his co-executor as a borrower. He said in substance: "I need a loan of money for a brief period. I will give you my note and a $1,000

bond of the Troy & Albia H. R. R. Co. as collateral security for the loan." In my judgment the case would not be different had Haslehurst applied in behalf of a third party engaged in like business to his own, and Smith had consented, under the same circumstances, to have made the loan, and that Haslehurst might turn over the money to him upon his furnishing his note and the bond, or any other of like character as collateral. Such a transaction would be utterly indefensible in my opinion; and the court of appeals say, in the case of Deobold v. Oppermann, 111 *N. Y.* 538, per RUGER, C. J.: "The employment and use of trust fund by the trustee in his trade or business, or as loans to persons engaged in such business, or the prosecution of commercial or manufacturing enterprises, or speculative adventures, have been uniformly considered as illegal, and as constituting a *devastavit* of the estate, ... authorizing the removal of the trustee." See, also, Wilmerding v. McKesson, *supra*. The rule above cited condemns the knowing employment of a trust fund by the trustee in business enterprises without special consideration of the character or quality of the security taken. In this case it was a loan upon personal security,—a promissory note. Such a loan requires no citation of authorities for its condemnation. The fact that a railroad bond was given as collateral we do not think changes the character of the transaction.

Even if a railroad bond might, under some circumstances, be a justifiable investment for a trust fund, it does not belong to the class of which the courts approve, and the burden of showing the value and suf-

ficiency of the security is upon the trustee before the question of its acceptance is entitled to the slightest consideration. The bond of a horse-railroad company, secured by a mortgage upon its tracks, is not such a real-estate security as will authorize trustees to invest trust funds thereon. Judd v. Warner, 2 *Dem.* 104; King v. Talbot, 40 *N. Y.* 90. But we prefer to place our disallowance of the credit upon the ground that the trustee Smith distinctly assented to the making of a temporary loan, presumptively for business purposes, which brings the case within the rule that a trustee is liable for the defaults of his co-trustee where he is a consenting party to the waste, or neglects some duty consequent upon his knowledge of misapplication intended or in progress. Croft v. Williams, *supra.* See, also, Wilmerding v. McKesson, *supra.* It plainly appears that the trustee Smith knew and understood that this loan was made for a temporary purpose to a person engaged in business, and was in fact for business purposes. If he might consent to the loan of $1,000 to Haslehurst, secured by his note and collaterals, of whatever character they were, he might have loaned him the entire estate, and placed the trust fund at hazard, not only of the business of Haslehurst, but also of various other enterprises represented by the collaterals.

Such investment, in the language of the court cited, undoubtedly constituted a *devastavit* that authorizes the prompt removal of the trustee guilty of the wrongful act. But it is claimed that, as Smith did not actually have the fund in his possession, he did not give Haslehurst control of the fund, and so was not guilty

of any wrongful act. But he had notice of and consented and participated in the wrongful misappropriation of this fund by Haslehurst, and under all the authorities he would be guilty if he took no steps with such knowledge to prevent the consummation of the intended wrongful act. It is no answer to say that, if he did not consent, Haslehurst would have probably taken the funds without his consent. It is sufficient to say he did a wrongful act in consenting to an improper investment of the trust fund, and, *non constat*, had he refused his consent, and insisted upon a proper investment of the fund, that it would not have been made. At any rate, his refusal would have gone far towards his exoneration, although under the law, as it now stands, he would have been authorized to apply to the court for a direction as to the disposition of the fund upon his refusal to accede to his request. Wood v. Brown, 34 *N. Y.* 337; Code Civil Proc., § 2602.

The examination of this account has satisfied me that this fund has been managed with great laxity and disregard of the law with respect to its investment. I find from the account that loans have been made not only to Haslehurst, with the consent of Smith, but Smith has taken loans himself,—whether with Haslehurst's consent or not does not appear,—until at the date of his account, January 1, 1890, said loans to Smith have increased to $6,000. In addition, as we understand the account, the trustee holds a note of George B. Smith & Son for $1,500. It is stated in the account that the $6,000 loan has collateral security. Such investment of the fund is unlawful, and utterly without excuse, and demands the severest condemnation; and

I direct that the said trustee (Smith) immediately invest said fund in lawful securities, and make a report to me of the investment so made within five days; in default thereof, show cause why he should not be removed from his office.

Let a decree be drawn in pursuance of this opinion.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—July, 1891.

MATTER OF TUIGG.

In the matter of the estate of EDWIN P. TUIGG, *deceased.*

The amount of a note made by a residuary legatee to testator included in the bequest of the residue of testator's estate to the maker of the note is subject to the collateral inheritance tax.

The collateral inheritance tax not being a tax on property, but on the right of succession, United States bonds are subject to taxation under the act.

A foreign society, corporation or institution, is liable to the collateral inheritance tax, although such society, corporation or institution is exempt from taxation under the law of its origin and organization.

PROCEEDINGS for the appraisement of the estate of Edwin P. Tuigg, under the Collateral Inheritance Tax Act.

DELANCEY NICOLL, *District Attorney, for the Comptroller.*

THE SURROGATE.—By the will of testator his resid-

uary estate was bequeathed to the Mother Superior of the Sisters of Charity at Pittsburgh, Pa. This bequest included a note for $7,000 made by the Mother Superior, which, with interest, amounted, at the date of the appraiser's report, to $7,233.33. It is claimed by the counsel for the residuary legatee that as to this sum the legatee is exempt from tax, on the ground that the note has no market value, inasmuch as the testator, by his will, forgave and extinguished the debt. It is also claimed that the note has no market value, inasmuch as it had no legal inception, and, if sued upon, no recovery could be had thereon. In Tyson's Appeal, 10 *Pa. St.* 220, the will of testatrix recited that her brother-in-law was indebted to her on a bond, with interest thereon, and that, in case he should make no charge or demand against her estate for board or for services rendered to her during her lifetime, then she bequeathed to him the said principal debt or sum, with interest, and directed the cancellation and delivery to him of the bond. The court held that the legacy was subject to the tax. In the opinion of the court in this case there is no discussion, but simply a statement of the conclusion reached. The note in the case at bar represents a debt due by the legatee to the testator, and the executors could be compelled to include it in their inventory as an asset of the estate. If testator died insolvent, creditors might pursue the maker on this obligation. The legatee must either accept the benefit provided in the will under the condition of assuming with it the burden imposed by law, or he may reject the same. If he elects to reject the legacy

provided by the will, the legacy would go as in case of intestacy, forming, as it does, a part of the residuary estate, and following the rule where a portion of the residuary bequest is void. In that event there can be no doubt that the next of kin could sue upon the note. The appraiser properly reported this portion of the residuary estate as subject to the tax.

It is also claimed in behalf of the residuary legatees that $13,000 par value United States bonds included in the residuum are not taxable. It has been frequently held by courts of competent jurisdiction that United States bonds are taxable under this act. Estate of Howard, 5 *Dem.* 483; Wallace v. Myers, 38 *Fed. Rep.* 184; Estate of Van Kleeck, 121 *N. Y.* 701. In Strode v. Commonwealth, 52 *Pa. St.* 181, the executor, in the settlement with the residuary legatees, transferred to them specific United States bonds at the time at which they were appraised; and the question was whether, under the laws of the United States and of the state of Pennsylvania, the said bonds were liable to the Collateral Inheritance Tax. WOODWARD, C. J., in rendering the opinion of the court, said: "The simple question is whether our collateral inheritance tax is applicable to that part of the testator's estate which consisted of bonds of the United States that were by law exempted from state taxation, and the opinion of the learned judge below is so satisfactory as to leave very little for us to add. The mistake of the learned counsel for the plaintiff in error consists, we conceive, in treating this as a tax of the government bonds, when it is really a tax upon the decedent's estate, dying without lineal heirs; and it does not help

the argument that the bulk of the estate is made up of these bonds, for that estate passed into the hands of the executor for administration, and is taxed in his hands as an estate. The law takes every estate of decedents into custody, and administers it for the benefit of creditors, legatees, devisees, and heirs, and delivers the residue that remains, after discharging all obligations, to the distributees entitled to receive it. One of the legal obligations to which every estate that is to go to collateral kindred is subject is this 5 per cent duty to the commonwealth, and it is not until this work of administration is performed that the right of succession attaches. The distributees may, indeed, consent to accept certain goods and chattels *in specie*, without conversion, as is frequently done in the settlement of estates, but such arrangement in no way affects the theory of the law that the estate is first to be administered and then enjoyed. Now, this 5 per cent tax is one of the conditions of administration, and to deny the right of the state to impose it is to deny the right of the state to regulate the administration of decedents' goods. If an estate consisted wholly of federal bonds, and is indebted, conversion of them into money is necessary to pay the debts, and nobody would doubt that the sum that remained after the payment of debts would be subject to a deduction of 5 per cent for the use of the state. But suppose the federal bonds be used to pay the only indebtedness that exists, and a residue of estate remains for distributees, is it not to pay the collateral inheritance tax? Clearly, it must, though it may be less than the aggregate of the bonds. The act operates on the

residue of the estate after paying debts and charges, and, theoretically, that residue is always a balance in money. The administration account always exhibits a balance in cash, not in specific goods, whether bonds or horses; and, though an heir may take bonds or horses as cash, the account must show, and always does show, a cash balance. That is the fund taxed by this law, and not bonds or other chattels that may have produced the fund. Therefore neither the prohibition of the act of congress of 1862, nor any of the other principles of decision against the state authority to tax that which the federal authority has exempted from federal taxation, have any application here. The federal government has not prohibited states from prescribing rules of inheritance and succession of estates of decedents, and it would be a grievous mistake of legislative and judicial authority to apply it with such effect." This opinion of Judge WOODWARD, which is quoted above is quoted largely in the opinion of Judge ROLLINS, in the Howard Case, *supra*. It was held in a Pennsylvania case, (Commonwealth v. Herman, 16 *Wkly. Notes Cas.* 210,) that state bonds "exempt from taxation for all state purposes," etc., are, nevertheless, liable to collateral inheritance tax as a part of decedent's estate. The collateral inheritance tax is not a tax on property, but on the right of succession. The line of reasoning pursued by the chief justice in Strode v. Commonwealth, *supra*, is the same as the other cases cited, and there can be no doubt that the argument is sound. The report of the appraiser that the portion of the residuary estate consisting of United States

bonds is taxable under the act must be confirmed. The general claim is made by the counsel for the residuary legatee that the legatee is exempted because it is a charitable institution. Affidavits were filed before the appraiser showing that the residuary legatee is engaged in benevolent and charitable works, visiting the sick, assisting the poor, and teaching the poor children; that they give free instruction to over 5,000 children; and that neither the children nor their parents are required to pay anything for instruction, and it is absolutely free. The sisters receive no compensation whatever from any source for visiting the sick and assisting the poor, and they make no charge therefor. Counsel relies chiefly upon the Vassar Case, 58 *Hun* 378, but the claim is without foundation. Even conceding that it was proved before the appraiser that it is such a society, corporation, or institution as is exempt under the laws of Pennsylvania, (which is not the case,) it is sufficient here to refer to Catlin v. Trustees of Trinity College, 113 *N. Y.* 133; Matter of McCoskey's Estate, 6 *Dem.* 438, which holds that a foreign society, corporation, or institution is not entitled to the benefit of the exception, even though exempt under the law of its organization and origin. The report of the appraiser should be confirmed.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—October, 1891.

MATTER OF ROGERS.

In the matter of the estate of JASON ROGERS, *deceased.*

Where a petition has been filed asking for the judicial settlement of the account of trustees under a will, and also that the trustees pay a portion of a legacy which is claimed by the petitioner by assignment, where it appears that the petitioner is not entitled to such payment under Code of Civil Procedure, § 2804, as a person entitled by the terms of the will, the Surrogate will order a final accounting, it appearing on the face of the petition that the petitioner is interested in the estate under the provisions of subdivision eleven of § 2514, he has a right to present such a petition.

Upon the judicial settlement of the account of a testamentary trustee a Surrogate has under § 2812 of the Code of Civil Procedure jurisdiction to determine the validity of the assignment of the interest of a beneficiary.

PETITION of the Rogers Locomotive & Machine Works against Thomas Rogers (in the matter of the estate of Jason Rogers, deceased) for an accounting of dealings with a trust, and for payment of shares of the benefit assigned. The petition in this matter, presented by the Rogers Locomotive & Machine Works, of the city of Paterson, N. J., shows that the will of the deceased, among other things, created a trust in favor of Thomas Rogers; that said Thomas Rogers & William Cauldwell are the present trustees; that more than a year has elapsed since the will was admitted to probate; that the trustees have filed no account within a year; that the amount of the estate

held by them is $500,000; that by the terms of the will the trust as to the share of Thomas Rogers is terminated, and is now payable; that said Thomas Rogers heretofore assigned his share to the extent of upwards of $35,000 to one Robert S. Hughes, who duly assigned the same to the petitioner; and prayed that a decree might be made directing the trustees "to render a final account of their proceedings, and pay to your petitioner said share of said Thomas Rogers, or sufficient thereof to satisfy" their claim, "and that they and all persons interested in said estate be cited to show cause why they should not render such account, and pay the same." The trustees, on the return of the citation issued, filed an answer, in which they allege that the pretended assignment to Hughes was without consideration; that the same is void; that said Hughes, as such assignee, never had, and has not now, nor has the petitioner, any interest in the estate of the testator or in any part thereof; that the interest claimed by the petitioner is also claimed by said Thomas Rogers; that the petitioner is not possessed of sufficient interest to compel an accounting; and that the court has no jurisdiction to determine the said conflicting claims.

BRISTOW, PEET & OPDYKE, *for petitioner.*

WM. M. DU BOIS, *for trustees.*

THE SURROGATE.—The petitioner has embarrassed the proceeding by praying for two different kinds of relief, the proceedings in which are regulated by different modes by the Code. By section 2804, where

a person is entitled by the terms of the will to the payment of money by a testamentary trustee, he may petition for payment; and by the next section, if the trustee file an answer showing that it is doubtful whether the claim is valid and legal, and denying its validity or legality, the Surrogate shall make a decree dismissing the petition, etc. This, as will be seen by reference to the Code, is a proceeding by itself, and distinct from others. Then sections 2807–2809, *et seq.*, provide another distinct proceeding for the judicial settlement of the accounts of testamentary trustees. These cannot well, and never should, be joined. As the petitioner cannot thus pursue both remedies at once, instead of dismissing the proceeding here it would be fair to permit it to elect the one on which it desires to proceed, were it not that it is in no position to proceed under section 2804 for the payment of its alleged claim, because it is not "entitled, by the terms of the will," to anything; it not being named therein at all. The petition will therefore be regarded as praying for an accounting only; and, as the petitioner is, on the face of the petition, interested in the estate, under the provisions of subdivision 11 of section 2514, it has a right to present such a petition. This being so, and the answer of the trustees having raised an issue as to the validity and legality of the claim, it is insisted that it has shown "good cause," under the provisions of section 2727, which is made applicable by section 2809 to a compulsory accounting by trustees, why the proceeding should not be entertained. In other words, that this court has no power to try the issue thus raised.

It does not seem that this question has been adjudicated.

It is true that the court of appeals has decided that the Surrogate's Court has no power to try a question as to the validity of a release in certain cases, (Saunders v. Soutter, 126 *N. Y.* 193,) and without careful consideration it might be assumed that, for like reasons there assigned, it had no power to try the validity of an assignment.

While the doctrine may be sound when applied to the accountings of executors and administrators, it would seem that the Code establishes a different rule in the cases of accountings by trustees, for it provides by section 2812 that "upon a judicial settlement of the account of a testamentary trustee every controversy which arises respecting the right of any party to share in the money or personal property to be paid, distributed, or delivered over must be determined in the same manner as other issues are determined." If the words "by the Surrogate" had been added, there could have been no probable room for doubt by reason of the remaining clause of the section. But that doubt is partially removed when we reflect that the Surrogate's Court, as well as any other court, may direct the distribution and retention there provided, pending the controversy before his court; and will be entirely removed when we refer to the legislative intent in that connection.

The commissioners, in their draft of the Code in 1875, appended notes to the various sections reported by them to the legislature for enactment, and gave the number of the section in question as 2581. In

the note to that section the commissioners say: "The first sentence is sufficiently explained in the note to section 2518, *ante*. The second sentence takes the place of section 2521, *ante*, which is only partially applicable to these proceedings." Turning to the note to section 2518, we find that after considerable reflection, and in view of decisions settling the question adversely to the power of the Surrogate to determine claims on the accounting of an executor or administrator, it was concluded to acquiesce in the views expressed in those decisions in framing that section. Then they say: "It has been said that, as the Surrogate is required to pass upon disputed claims upon an application to sell the decedent's real property, it is an anomaly to deny him the same power upon the settlement of the executor's or administrator's account; that this anomaly is rendered more striking by the circumstance that he can and must pass upon such claims as Surrogate upon settling the accounts of a testamentary trustee of the same estate," etc.; and again: "The supposed anomaly arising out of the rule in the case of testamentary trustees and upon application to sell real property disappears upon a closer examination, for in each of those cases the Surrogate sits as a court of equity; and a trial before him is the most convenient and speedy method of determining the issues." By reference to section 2521, which is 2745 of the present Code, it will readily be seen why it is only "partially applicable to these proceedings," without in any way depriving the Surrogate of the power of determining controversies arising before him.

It strikes me that the legislative intent to confer power on the Surrogate, in proceedings of this character, to hear and determine a controversy as to the validity or legality of an alleged assignment by a *cestui que trust* of his share, is too plain to be mistaken. The proceeding is therefore retained for the purpose of determining the question, and such other questions as may be presented. An order will therefore be entered directing the trustees to account.

NEW YORK COUNTY.—HON. RASTUS S. RANSOM, SURROGATE.—November, 1891.

MATTER OF SWIFT.

In the matter of the estate of JAMES T. SWIFT, *deceased.*

The fundamental test of the right to tax the devolution of property either by will or in case of intestacy, is to ascertain the sovereign power through whose favor the property is permitted to pass. The power to tax this privilege is commensurate with its dominion over the property.

Where by testator's will real estate situated without the state is directed to be converted into personalty, the proceeds thereof are not taxable under the collateral inheritance tax, although such proceeds are brought within the state for distribution.

Personal property located without the state remitted to this jurisdiction for distribution is not subject to the collateral inheritance tax.

By the will of deceased it was directed that all legacies and devises therein made should be free of succession or other tax, and that such tax should be paid by the executors as part of the expenses of the administration. *Held:* That the amount of the collateral inheritance tax should not be deducted from either the specific or residuary legacies in ascertaining the value thereof as subject to the tax.

MATTER OF SWIFT.

Where, by the will of deceased, testator gives certain paintings, pictures, plate and other articles to certain persons, but three of whom are taxable under the collateral inheritance tax, it is error to impose the tax upon the aggregate value of the property thus bequeathed. To the extent that this aggregate valuation represents property bequeathed to persons exempt by reason of their relationship to the deceased or by reason of their receiving, under all the provisions of the will, beneficial interests less than five hundred dollars in value, it is not taxable.

HEARING upon exceptions to a report of an appraiser appointed under the Collateral Inheritance Tax Act to ascertain the value of certain legacies bequeathed by the will of James T. Swift, deceased.

DELANCEY NICOLL, DISTRICT ATTORNEY, *for the Comptroller.*

THE SURROGATE.—The first exception to the report of the appraiser herein is that, in appraising the value of the estate of the residuary legatees, he has included certain real estate, of which testator died seised, situated in the state of New Jersey. The appraiser included the proceeds of this real property, apparently for the reason that the provisions of the will operated as an equitable conversion thereof for the purpose of paying legacies and making distribution, which conversion had actully taken place; and the proceeds are now in this jurisdiction for the purpose of distribution under the terms of the will. No brief has been filed by the comptroller to sustain the report, though on the oral argument he relied for its confirmation upon Miller v. Commonwealth, 111 *Pa. St.* 321. In that case, a testator, domiciled in the commonwealth of Pennsylvania, devised land situated without the state, which was to be sold to pay pecuniary legacies. It was held that the legacy would pass to the legatee as

money and subject to the law of the testator's domicil, and hence would be subject to the collateral inheritance tax. In Drayton's Appeal, 61 *Pa. St.* 172, a testator in Pennsylvania gave his residuary estate to collaterals, and authorized the executors, in their "discretion, to sell, on such terms as to them shall seem expedient, all real estate." He owned real estate in Minnesota, which his executors sold, and deposited the proceeds in Pennsylvania in their general account as executors, with money arising from the personalty, drew on the whole fund for the purposes of the estate, and charged the proceeds in their general account as executors. It was held that these proceeds were not liable to collateral inheritance tax. The court does not consider or discuss in either of these cases its right to apply the doctrine of equitable conversion to real property situated without the state, for the purpose of levying a collateral legacy tax upon the proceeds thereof brought within its jurisdiction for distribution. Those cases, therefore, cannot be regarded as authority upon the fundamental principle which must be determined in this proceeding.

"A succession tax is not a tax on property, but on the privilege of succeeding to the inheritance. It is not a direct tax upon the land taken by descent, but is an impost upon the devolution of the estate, and the right to become beneficially entitled thereto, or to the income thereof." Cooley, Taxation, (2d ed.,) p. 30, and cases cited; Matter of McPherson, 104 *N. Y.* 306; 10 N. E. Rep. 685.

Upon the death of a person leaving property within this state, that property, whether real or personal, re-

verts to the state. Prior to the passage of the act taxing collateral inheritances, the state permitted the owner to dispose of the same by will, upon complying with certain statutory requirements, and, in case of his omission to do so, directed the manner in which it should be distributed. The state imposed no burden or other condition upon the exercise of this privilege until the passage of this act. It seems to me, therefore, that the fundamental test of the right to tax the devolution of property, either by will or in case of intestacy, is to ascertain the sovereign power through whose favor the property is permitted to pass. The power to tax this privilege is commensurate with its dominion over the property. It is plain that, with reference to extra-territorial real estate, this state could confer no privilege governing the devolution of the title thereto, and consequently, if the test suggested above is a true one, it could impose no conditions upon its exercise. "Everything to which the legislative power extends may be the subject of taxation, whether it be person or property, or possession, franchise, or privilege or occupation or right. . . . . And not only is the power unlimited in its reach as to subjects, but in its very nature it acknowledges no limits, and may be carried to any extent which the government may find expedient." Cooley, Taxation, (2d. ed.,) p. 5. "The taxing power of a state is co-extensive with its sovereignty, and whatever objects of government are within its reach are subject to it, and may be made the basis of levies. It is commonly said that taxation and protection are reciprocal, and this, if rightly understood, is correct, though some subjects receive the protection

of the government which are not taxable, and some may be taxed though not protected." Id., p. 19. "A state can no more subject to its power a single person or a single article of property, whose residence or legal *situs* is in another state, than it can subject all the citizens or all the property of such other state to its power." Id., p. 159. The test suggested above furnishes a uniform and symmetrical method of determining the extent to which the beneficial interests conferred by will or by intestate laws are measured for the purpose of taxation under the act. In applying this test, no convenient fictions of law, which are resorted to by courts of equity for the purposes of justice, should be recognized. The law will then deal only with actualities.

I doubt if the doctrine of equitable conversion would have been invoked by the comptroller if the mischievous result to the state were foreseen which the application of this principle would have accomplished. Thus, under the act as amended in 1891, direct relatives of a decedent, leaving personalty in excess of $10,000, are made subject to the tax, while they are exempt if the interest passing is realty. If, as contended on behalf of the state, the doctrine of equitable conversion may be successfully invoked in taxing interests under this act, a testator with a vast estate, consisting almost exclusively of personalty, having in view the exemption where the beneficial interest passing is realty, could bequeath personalty to any amount to direct relatives, having previously, by an appropriate direction in the will, worked an equitable conversion of the personalty into real estate. In this manner, the chief object the legislature had in view in passing

the act, viz., compelling personal property to pay its just proportion of taxation, would be defeated.

It has also been suggested by the learned counsel for the executors (to whose able brief and exhaustive inquiry I have been greatly indebted in considering this problem) that a testator might direct his personal property within the state of New York to be converted into real estate in New Jersey, and as such devise it; and he propounds the query: "Would the state of New York then be willing to admit that the gift was real property out of its jurisdiction, and not taxable?" To support the application of the doctrine of equitable conversion in determining the extent of liability to this tax, it must be held to have been the intention of the legislature to permit testator to determine for himself whether the devolution of title should be subject or exempt.

The second exception relates to the taxability of personal property located without the state, and which is remitted to this jurisdiction for distribution. It presents a question which at first occasioned some difficulty. But, on reflection, I see no good reason why the test suggested with reference to real property will not apply equally to personalty. "A nation within whose territory any personal property is actually situated has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situated there." Story, Confl. Laws, § 550. The chief argument of the counsel for the executors, in maintaining that such property is not liable to the succession tax, is the maxim in the law of taxation, that protection and taxation must be recipro-

cal, and that under such circumstances personal property may be compelled to pay a double tax on its devolution; and he cites the language of the court of appeals in the Enston Case, 113 *N. Y.* 174, to show that an influential consideration with the court in deciding the case was the reluctance to construe a tax-law so as to impose a double burden. In Cooley on Taxation, numerous cases are cited which show that, while double taxation will not be presumed, it is still within the power of the state to pass such a law, and it is no objection to its validity that such a result is accomplished.

It will be seen that the test suggested has its foundation in the law of escheat. Take the case of a resident of this state dying intestate, without heirs at law or next of kin, and owning real and personal estate situated in New Jersey. It would not for a moment be contended that the real property, under these circumstances, would escheat to any other sovereignty than the state of New Jersey. The law of escheat, with reference to real estate, is identical with that as to personalty, and it can hardly be questioned but that the personal estate, under those circumstances, would follow the same rule. Johnston v. Spicer, 107 *N. Y.* 185–196. That state has dominion over the property, and in the exercise of that dominion, and pursuing the comity of nations, permits the transmission of personal assets to the jurisdiction of domicil for the purpose of distribution; but, even in this case, it exerts its dominion, so far as may be necessary for the protection of the interests of its own citizens, as,

for instance, creditors, by retaining sufficient assets to meet their claims.

Another argument in favor of this contention is that by adopting this rule we avoid inconsistency in the tax-law, and oppression by the taxing power. The court of appeals have decided in the Romaine Case, 127 *N. Y.* 80, that the personal property of a non-resident decedent, which has its *situs* in this state, is subject to the tax. "In a well-adjusted system of taxation, a fundamental requisite is that it be harmonious. But harmony does not exist unless the taxing power is exerted with reference exclusively either to the *situs* of the property or to the residence of the owner. Both rules cannot obtain unless we impute inconsistency to the law, and oppression to the taxing power. Whichever of these rules is the true one, whichever we find to be founded in justice and in the reason of the thing, it necessarily excludes the other; because we ought to suppose, indeed, we are bound to assume, that other states and governments have adopted the same rule. If, then, proceeding on the true principles of taxation, we subject to its burdens all goods and chattels actually within our jurisdiction, without regard to the owner's domicil, it must be understood that the same rule prevails everywhere. If we also proceed on the opposite rule, and impose the tax on account of the domicil, without regard to the actual *situs*, while the same property is taxed in another sovereignty by reason of its *situs* there, we necessarily subject the citizen to a double burden of taxation. For this no sound reason can be given." Hoyt v. Commissioners of Texas, 23 *N. Y.* 228.

The third exception to the report is that, in determining the value of the residuary estate, the appraiser erred in failing to deduct the amount of the tax to be assessed against that interest as an expense of administration. The ninth clause of the will is as follows: "I direct that all legacies and devises herein made shall be free of any succession or other tax, and that any and every such tax thereon shall be paid by my executors as part of the expense of administering my estate." In ascertaining the value of the residuary estate for the purpose of taxation, the appraiser had deducted the amount of tax on other legacies given by the will. It is claimed that he should have also deducted the amount of the tax to be paid on the residuary estate from its gross value. I fancy it will not be contended that a testator can, by a provision in his will charging the payment of the legacy tax upon the residue or any other designated fund, deprive the state of any revenue which it would otherwise receive. To illustrate: Suppose a testator bequeath to A. $500, to B. $500, and the balance of his estate, amounting to $4,000, to C., all the legatees being collateral. In that event the state would be entitled to receive a sum of money equivalent to 5 per cent of $5,000, viz., $250. By charging the payment of the tax due upon the first two legacies upon the residue, he cannot reduce the sum which the state would otherwise derive. To put the case in a different, and perhaps stronger, light: Suppose there is no residue, but the will directs the payment of the tax out of the same.

The law must be construed, if possible, so as to pro-

vide for every possible case; and it will be seen that, by applying the rule which would have to be applied in the case last presented, the true method of assessing the tax upon estates bequeathed in this manner is ascertained. The direction that the tax shall be paid out of the residue is no concern either of the state or the appraiser. He should report the legacies taxable, as if no such provision were contained in the will. In the case at bar, the report of the appraiser is incorrect so far as he has deducted from the value of the residue the taxes which must be paid out of that fund. He was correct in refusing to deduct from the residue, in ascertaining its value for the purpose of taxation, the sum of money which would be payable by the legatees.

The fourth exception. By the fourth clause of his will, the testator gave to his executor "such paintings, pictures, plate, or other personal articles as may be specified by me in a note or memorandum which I may leave, either of this or a subsequent date, ... upon trust to dispose of the same in such manner as I shall by such note or memorandum direct or request." But three of the persons designated in the memorandum referred to receive taxable benefits. The appraiser has reported the aggregate value of the property thus bequeathed as subject. In this he is in error. To the extent that this aggregate valuation represents property bequeathed to persons exempt by reason of their relationship to deceased, or by reason of their receiving, under all the provisions of the will, beneficial interests less than $500 in value, it is not taxable. The value of the benefit received under

this provision of the will by unexempted persons who receive benefits under other provisions of the will must be taken into account in assessing the tax. The matter must be remitted to the appraiser to report anew in accordance with this decision.

INDEX.

ACCOUNTS.

1. A father mortgaged his farm in 1873, and paid the proceeds thereof to his son, who invested the same The son paid interest on the mortgage given by the father for some years. Then the son wished to pay a lower rate of interest, and the father in 1879 executed a new mortgage on his farm, with the proceeds of which last mortgage the son paid off the former one. The son paid interest on the last mortgage until about the time of his death, in 1882. The son's books showed a final settlement in 1879, with his father, and charged him with the payments thereafter made. There was no allusion in the son's books to the mortgage or to his liability under it, but the testimony established the facts above given. *Held*, that the loans were made for the son's benefit, and that the statute of limitations did not bar the father's claim against his estate. *Matter of Strickland*, 10.

2. The father also made a claim against the deceased son's estate for services in relation to the care of stock, food for the stock, and board for the son and his servants. It did not appear that any of the items were ever presented to the decedent, and there was no allusion to it in any of his books. The father himself had no account or memoranda showing any of these transactions, but made up his charges solely from recollection. The father and son had at least two settlements, and a note was given as evidence of indebtedness from the son, and money was often paid by one to the other in payment of claims and accounts, yet this claim of the father for services and expenses nowhere appeared. *Held*, that such claim must be disallowed, there being no proof of an express agreement, or mutual expectation of payment. *Id.*

See ACCOUNTING.

ACCOUNTING.

1. An executrix took possession of a store which had belonged to the testator, under claim that s e was the purchaser of the stock of goods and fixtures, and thereafter conducted the business on her individual account. Objections having been filed to her account by creditors, the issues thus raised were litigated. The creditors sought to charge her with the value of the goods at the time she took possession of the store and offered no evidence as to profits. *Held*, that the creditors could not, for the first time, by their brief filed upon the judicial settlement of the account, charge the executrix with the profits of the business,

there having been no evidence offered by them upon that issue. *Matter of Randell*, 29.

2. The claim to an account of profits cannot stand with one that the executrix must be charged with the value of the good will of the business. The two are inconsistent. One proceeds upon a theory that the business was conducted as that of the estate; the other, that the business with the good will passed to the individual benefit of the executrix. She cannot be held for both. *Id.*

3. Where an executrix, not knowing of the insolvency of an estate, has paid certain claims in full, she is, upon her accounting, entitled to credit only for the amount which should have been paid upon these claims *pro rata*, and she loses the excess over that amount paid by her. *Id.*

4. A note held by an executrix made and delivered to the executrix by the testator as a gift is entitled to share *pro rata* for the amount thereof, and interest thereon from its date, with the other debts of the estate, there being no proof that the same is fraudulent as against the creditors of the testator. *Id.*

5. The good will of a business of a decedent is to be accounted for by the executrix, and when the executrix has taken possession of and conducted a store business previously owned by her testator, she will be charged with the value of the good will. *Id.*

6. The good will of the business of a testator does not include the right to use that testator's name, and where an executrix has not taken the necessary legal steps under Laws, 1880, ch. 561, amended by Laws, 1881, ch. 389, allowing the use of the name of a deceased person in business, to acquire the right to use such name, she should not be charged for the use thereof as a part of the good will of the business. *Id.*

7. A legatee duly cited, who has filed no objections to an executor's account, is not entitled to cross-examine the executor in relation thereto. *Matter of Gilman*, 78.

8. Testator left to his wife his personal property absolutely and the use of his real estate for life, and the real estate was directed to be sold at her death and the proceeds distributed to his descendants. There was a judicial settlement of the account of the executor, to which the widow alone was cited, and under the account as then presented a balance was found due from the estate to the executor. Upon a subsequent accounting, to which all the parties in interest were cited, it appeared that at the time of the prior accounting there was an amount in his hands sufficient to pay all the debts of the estate, including a claim of his own. *Held*, that the executor could not on the second accounting maintain a claim for his debt against the realty of the estate. *Matter of Willard*, 112.

9. A proceeding for an accounting commenced upon the Surrogate's own motion is an intermediate account and when filed it should be in such

shape that it may be settled in a proceeding to be instituted under § 2729 of the Code of Civil Procedure. *Matter of Dwight*, 180.

10. Where an administratrix, the widow of decedent, and also appointed general guardian of his and her children, has applied the personal estate partly to some necessary repairs to the dwelling-house of decedent commenced by him before his decease, and necessary to make the house tenantable for herself and the minor children of decedent, and partly in good faith to the payment of incumbrances, taxes and insurance on the real estate which payments were necessary for the preservation of the property of the estate and beneficial to the minors her wards who lived with and were maintained by her, such payments will be allowed upon an accounting by her as such administratrix. *Matter of Rolph*, 191.

11. Such intermediate account should state if an inventory has been filed, or if not, the account itself should furnish the information usually thus supplied. It should likewise state fully all the matters as to advertisements for claims, what claims have been presented, allowed or rejected, and the time and manner thereof and the reason for allowance or rejection. The account should also contain the funeral charges and expenses of administration, moneys paid to creditors, legatees and next of kin. It should also state the age of the legatees and next of kin, and if any of them are minors; if so, the names and residences of their guardians. The accounting party is bound also to state any other fact which has occurred as part of his proceedings which may affect the estate, or the rights of any distributee, or his own rights. And he must produce vouchers for each payment, or if such payments were under twenty dollars, in lieu of a voucher his own oath as to the fact of payment, when made, and to whom. *Matter of Dwight*, 180.

12. The order of the Surrogate made upon his own motion for an accounting may be answered by the representative of the decedent filing with the court the releases duly acknowledged of all the parties interested in the distribution of the fund either as legatee or next of kin. In the case of the death of such legatees or next of kin similar releases should be obtained from their personal representatives. *Id.*

13. An action for an accounting may be maintained to obtain an administration of the estate of a testator, against the executor of a life-tenant to whom letters c. t. a. had been issued and the assets of the testator delivered less than six years before the commencement of the proceeding for the accounting. And this is not changed by the fact that the issuing of letters testamentary, to the executor since deceased, of the original testator took place eleven years before the institution of such proceedings. *Matter of Post*, 243.

14. An accounting party is not confined to sections 2561 and 2562 of the Code of Civil Procedure in remunerating his counsel, but may expend such sums as he deems proper in that behalf, to be included in his accounts, and the correctness and propriety of which may be contested by the persons interested. *Matter of Smith*, 418.

15. But to justify such items in an account it must appear that services beyond the ordinary preparation of the account, or for trial, were rendered and were necessary. *Id.*

16. L. 1874, ch. 446, provides for the confinement of the insane in the Buffalo State Asylum, and makes an insane person, or if the property of the insane person is insufficient, his parent, liable for his maintenance therein. In the present case, the administratrix, who was the widow of decedent, advanced the money necessary to pay for the proceedings preliminary to the confinement of the insane adult daughter of herself and decedent in the said asylum, and also half the expense of her maintenance while therein. *Held*, that upon her accounting the administratrix would be allowed these advances, to be deducted from the distributive share of the insane daughter. *Matter of Morris*, 372.

17. The Surrogate has power to approve the account of an executor to which objections have been filed but which is correct in every particular and so admitted in open court by the attorney for the objector, when no vouchers are or can be produced for several items thereof. *Matter of Langlois*, 481.

18. Upon the accounting of the administrators with the will annexed of a testator, an insane son of testator was represented by a special guardian who interposed no objections. Both the account and the decree recited the fact that the interest of the lunatic in the estate had been sold by virtue of certain judgments recovered against him and had been purchased by a devisee under the will. The judgments had been recovered before the son had become insane. Afterwards the wife of the lunatic and his special guardian made an application to set aside the decree on the ground that no sufficient proof had been offered on the accounting in regard to the acquisition of the lunatic's share by the devisee, and that the administrators with the will annexed upon their accounting withheld important facts and statements touching the rights and interests of said lunatic and made unlawful claims, to the great wrong of said lunatic. The petition did not state what specific acts had been committed or omitted by the administrators. *Held*, that there being no allegation denying the transfer to the devisee, and the other allegations of the petition being entirely indefinite, the application should be denied. *Matter of Baity*, 485.

19. Where a petition has been filed asking for the judicial settlement of the account of trustees under a will, and also that the trustees pay a portion of a legacy which is claimed by the petitioner by assignment, where it appears that the petitioner is not entitled to such payment under Code of Civil Procedure, § 2804, as a person entitled by the terms of the will, the Surrogate will order a final accounting, it appearing on the face of the petition that the petitioner is interested in the estate under the provisions of subdivision eleven of § 2514, it has a right to present such a petition. *Matter of Rogers*, 639.

See STATUTE OF LIMITATIONS, 4, 5, 10.

ACTION FOR ACCOUNTING.
See ACCOUNTING, 13.

ACTION FOR CONSTRUCTION OF WILL.
See RES ADJUDICATA.

ADMINISTRATION OF THE ESTATE.
See EXECUTORS AND ADMINISTRATORS.

ADMINISTRATRIX WITH WILL ANNEXED.

1. Where an executor has no authority under a will to collect rents from real estate, an administratrix with the will annexed who succeeds such executor can have no such right. *Matter of Blow*, 360.
2. Where an administratrix with the will annexed has wrongfully collected, with the consent and acquiescence of all interested, the rents of the real estate of testator which under the will should have been collected by a guardian of testator's minor children, the Surrogate has no power to compel such administratrix with the will annexed to account for such rents and profits, under section 2472, subdivision 3, of the Code of Civil Procedure giving to Surrogates authority to "direct and control the conduct and settle the accounts of executors and administrators." *Id.*
3. And such administratrix is not estopped by the fact that she has filed an account wherein she charges herself with such rents and profits wrongfully received by her. *Id.*

ALIEN.
See TREATY, 2, 3.

APPRAISEMENT.
See COLLATERAL INHERITANCE TAX, 17, 18, 20.

ASSIGNMENT.

1. To an application of a receiver of the property of a judgment debtor appointed in supplementary proceedings to compel an accounting by a testamentary trustee under a will by which the judgment debtor has in the estate an assignable interest, a complete answer is furnished by the facts that prior to the inception of the supplementary proceedings the judgment debtor had assigned his interest in the estate, that no order in the supplementary proceedings was ever served on the judgment debtor and that he was never examined in said proceedings. *Matter of Sistare*, 544.
2. The validity of an assignment of the interest of a beneficiary in the estate of a decedent cannot be attacked in the Surrogate's Court. *Id.*
3. Upon the judicial settlement of the account of a testamentary trustee a Surrogate has under § 2812 of the Code of Civil Procedure jurisdiction

to determine the validity of the assignment of the interest of a beneficiary. *Matter of Rogers*, 689.

See ACCOUNTING, 19.

BURDEN OF PROOF.

See COSTS, 1; EVIDENCE, 2.

BUSINESS OF TESTATOR.

1. Testator at the time of his death was a member of a partnership composed of testator and one N. The partnership articles provided that in case of the death of testator and the continuation of the business, the executors of testator should pay to N. such annual amount as should be agreed in lieu of the services of testator. The will of testator provided that the executors might employ so much of testator's capital in the business as in their opinion might be advantageously so employed, and upon such terms as to profits and losses as they might deem just and proper. For several years testator had taken no active part in the business. *Held*, that under the will the executors had power to enter into a partnership with the surviving partner, and that an agreement by them to allow the surviving partner $2,500 a year, chargeable against the estate, in lieu of the services of testator, was authorized. *Matter of Bach*, 490.

2. One of the executors, B., had been in actual charge of the business for some time before the death of testator and it appears that his services were very necessary to the business. After testator's death B. continued to perform in the new firm, composed of the executors and the surviving partner, the same duties as he had performed in the old firm. The surviving partner, N., who never interfered in any way with the business, paid the executor B. a salary for conducting the business. *Held*, that such an agreement was not improper. *Id.*

3. For the purpose of settling the estate and realizing on the assets, the plant and good-will of the business were sold at auction by the executors and the surviving partner. At this sale the surviving partner became the purchaser of such plant and good-will for a sum only about one ninth what the good-will alone was worth. One item of plant alone was worth twice the whole price paid upon the sale. Afterwards the surviving partner sold to one of the executors, a half interest in such plant and good-will, for half the amount so paid by him, and then they formed a new partnership for conducting the same kind of business. *Held*, that this transaction was within the prohibition of the law of even an indirect purchase by an executor of the assets of the estate. *Id.*

4. After the formation of the firm composed of the surviving partner of the former firm and one of the executors, the executors issued a circular to the persons interested in the estate, alleging that they had an offer from the new firm of a certain price for the outstanding accounts,

and further stating that they had no interest but that of the heirs, concealing the fact that one of the executors signing the circular was one of the members of the firm which wished to purchase the outstandings. The sale of a portion of the outstandings was made by the consents obtained from the heirs by this circular, in ignorance of the fact that the executor was an interested party to the transaction. *Held*, that the sale should be set aside, that the executors should account to the estate for the amounts received from such portion of the outstandings as have been realized on, that there should be a sale of the interest of the estate in the accounts unsold, that if, upon re-sale, they did not produce a larger sum than that realized by the executors, then the former purchase was to stand. *Id.*

See ACCOUNTING, 1.

CITATION.

See REVOCATION OF PROBATE, 2.

CLAIM AGAINST DECEDENT.

1. Where a claim of the administrator against the estate is assigned by him without consideration, by an assignment which is merely colorable and is referred as a disputed claim, and the administrator fails to interpose the defence of the statute of limitations, when such a defence is apparently available, allowing, without objection, incompetent evidence to be offered in support of the claim; in such case the judgment allowing such claim, as well as all claims for cost and expenses in connection therewith will be set aside and disallowed. *Matter of Hill*, 25.

2. Where services have been rendered and board furnished to one since deceased, upon his promise to compensate the person rendering and furnishing the same therefor, if the will of the promisor contains a legacy to the promisee sufficient to cover only a part of his claim, the legatee can recover the balance due; but where the testamentary provision to the promisee equals or exceeds the just amount of it, the claim is extinguished. *Matter of Somerville*, 86.

3. The testator had signed a non negotiable joint note as one of the sureties. The claim of the payee, duly verified, was presented to the executor, and the executor, who was a legatee under the will of testator, and two other witnesses, also legatees, testified that upon such presentation, the executor denied that the estate was liable on the note, and told the claimant that he must look to the makers thereof for payment. This testimony was contradicted by the claimant. The attorney for the claimant testified that he had a talk with the executor; that the executor then said that the testator was surety on the note, that it was the debt of the makers, and that they ought to pay it, and that that was all that was said. He also testified that there had been no objection or notice of rejection given to him prior to a written one which was sent to him twenty months after the presentation of the

claim, that the executor disputed the claim on the note and offered to refer it under the statute.

Held, that the evidence failed to show such a rejection of the claim as would compel the claimant to sue within six months thereon, under Code Civil Procedure, § 1882, to prevent the claim from being barred.

Further held, that the written notice of rejection was too long delayed, and that such delay amounted to an allowance of the claim by the executor. *Matter of Miller*, 134.

4. Although the general rule is that as between members of the same family neither party can recover for services rendered in the absence of an express agreement, nevertheless, where it appears that extraordinary services have been rendered by one member of a family to another and that there has been no reciprocity of services possible, a claim for such services may be allowed against the testator's estate. *Matter of Ryder*, 224.

5. Testator, a paralytic, was in such a condition that he had to be attended to with the same care as an infant. *Held*, that his daughter who took care of him and with whom he lived was upon his death entitled to compensation out of his estate even in the absence of an agreement for a specified compensation, there being previously a general promise of reward by testator. *Id.*

6. Where a claim of creditor has been disputed and rejected, and no other proceeding taken to enforce it within six months after such rejection than the bringing of an action thereon in a court which had not jurisdiction of action brought against the representatives of a decedent, such claim is barred by the short Statute of Limitations. *Matter of Radde*, 293.

See ACCOUNT, 2.

COLLATERAL INHERITANCE TAX.

1. Under the Collateral Inheritance Tax Act as amended in 1887 (Laws 1887, ch. 713, § 1,) money on deposit in this state and a bond secured by a mortgage on property here belonging to a non-resident decedent, is subject to the tax. *Matter of Clark*, 183.

2. A bequest in a will in payment of a debt, and not as a gift, is not subject to the collateral inheritance tax. *Matter of Rogers*, 198.

3. Under this rule where testator in his will gave and bequeathed to a creditor for whose security testator had affected insurance on his life "any and all benefits so far as his interests may appear and be proved" in his membership in a mutual aid association, such bequest was not subject to the collateral inheritance tax because the creditor and legatee took only to the extent of such debts as he could prove against the estate. *Id.*

4. A legacy of five hundred dollars payable at the end of a year from the date of the letters testamentary is not subject to the collateral inheritance tax. *Matter of Peck*, 201.

5. A legacy of five hundred dollars payable one year from the date of letters testamentary is not subject to the collateral inheritance tax, as its cash value is less than five hundred dollars. *Matter of Underhill*, 262.

6. A legacy of the value of five hundred dollars is of the fair market value of its face and is therefore subject to the collateral inheritance tax. *Matter of Bird*, 376.

7. A legacy to an institution for the blind which does not under any circumstances receive pay from its patients, is exempt from the collateral inheritance tax. *Matter of Underhill*, 262.

8. A legacy to a creditor upon condition that he accept the same as payment in full of all unsettled accounts and claims held by him against testator, such accounts and claims being somewhat in excess of the amount of the legacy, is not subject to the collateral inheritance tax. *Id.*

9. A person who takes a legacy under the exercise of the power of appointing legatees given to a trustee by a will, takes as by the will when such power is exercised by the trustee, and if his legacy is subject to the collateral inheritance tax, it is taxable at the time of the exercise of such power. *Matter of Stewart*, 281.

10. Where such appointment of a legatee is made more than eighteen months after the decedent's death, interest on the tax will be at the rate of six per cent from the death of decedent to the time of the entry of the order confirming the appraisement. If such tax and interest is not then promptly paid, interest thereon will run thereafter at the rate of ten per cent. *Id.*

11. The collateral inheritance tax being a tax upon the passing of property, section 384 of the Code of Civil Procedure requiring actions brought to recover a statutory penalty or forfeiture to be brought within two years after the cause of action accrues, has no application to proceedings to compel the payment of such tax. *Matter of Vanderbilt*, 319.

12. An executor is liable for the payment of such tax on property in his hands subject thereto, and he can only discharge himself by producing a receipt sealed and countersigned by the County Treasurer. *Id.*

13. The Surrogate has power to compel the payment of the tax, as one of the steps in the final adjustment and settlement of the estate. *Id.*

14. An institution which maintains a home and reading rooms, etc., for the poor, provides lodgings and meals free, but makes a small charge for a day nursery which it maintains, is not exempt as an almshouse from the collateral inheritance tax. *Id.*

15. An institution which is exempted under a special act from "local taxation or other purposes" is not exempt from state taxation and therefore is subject to the collateral inheritance tax. *Id.*

16. Legacies to the Metropolitan Museum of Art and American Museum of Natural History in the city of New York, which derive an income from memberships of various degrees, and dues, from admission fees

charged on certain days of the week, from the sale of books, specimens, etc., and from investments of property left them by will, etc., are subject to the collateral inheritance tax. *Id.*

17. Notice of an appraisement under the collateral inheritance tax act should be given to all the parties interested, including the District Attorney, the County Treasurer, (in New York city, the Comptroller,) and the legatees affected thereby. *Id.*

18. Where the appraiser has made a report which erroneously omits from appraisal certain legacies, although the same were subject to the tax, and such report has been confirmed after due notice to the county treasurer, this is such an adjudication as will protect the executor from any liability from the non-payment of the tax on these legacies by him, and in such case the only remedy of the state is a proceeding against the legatees whose legacies were omitted. *Id.*

19. A legacy to a child of an adopted child is not exempt from the collateral inheritance tax. *Matter of Bird*, 376.

20. In voluntary proceedings in New York county to appraise the estate of a decedent under the Collateral Inheritance Tax Act, Laws 1887, chap. 713, the comptroller of the city of New York is entitled to notice of the proceedings to appraise the estate under § 13, and the failure to give such notice renders the proceeding without jurisdiction and void as to the state. *Matter of Wolfe*, 600.

21. The acceptance by the comptroller of the tax on some of the legacies in a proceeding in which he had had no notice of the appraisement, does not estop him or the state from collecting other taxes on other legacies, under the same will, but which had been erroneously, and without notice to the comptroller declared to be exempt from the collateral inheritance tax. *Id.*

22. The collateral inheritance tax is a tax upon the devolution or succession of property and not a tax upon the property itself, and therefore a proceeding to enforce it is not *in rem*. *Id.*

23. An action to compel payment of the collateral inheritance tax is not an action for a penalty or forfeiture, (Code Civ. Proc., § 384,) which must be brought within two years after the cause of action has accrued. *Id.*

24. Where executors have paid a legacy in good faith after a decree of the Surrogate that such legacy is not subject to the Collateral Inheritance Tax Act, which decree is not binding on the state, for the reason that the comptroller was not made party to the proceedings for the appraisement, the executors will not be held personally liable for the amount of such tax paid by them, even if there should be a subsequent adjudication that the legacy so paid by them was subject to the tax. In such case the legatees are liable for the amount of the tax. *Id.*

25. The amendment to the Collateral Inheritance Tax Act, Laws of 1890, chap. 553, exempting certain religious, benevolent, etc., corporations

from the operations of the collateral inheritance tax has not a retroactive effect. *Id.*

26. Neither Grace Church, which is a religious corporation in New York city, organized under Laws 1801, chap. 79, and amendatory acts, nor the Metropolitan Museum of Art, incorporated under the Laws of 1870, chap. 197, which derives income from dues of members, sales of books, specimens, etc., and which gives to its members, certain privileges not shared in by the general public, is a free public charity, and therefor neither is exempt from the collateral inheritance tax. *Id.*

27. The amount of a note made by a residuary legatee to testator included in the bequest of the residue of testator's estate to the maker of the note is subject to the collateral inheritance tax. *Matter of Tuigg*, 633.

28. The collateral inheritance tax not being a tax on property, but on the right of succession, United States bonds are subject to taxation under the act. *Id.*

29. A foreign society, corporation or institution, is liable to the collateral inheritance tax, although such society, corporation or institution is exempt from taxation under the law of its origin and organization. *Id.*

30. Where by testator's will real estate situated without the state is directed to be converted into personalty, the proceeds thereof are not taxable under the collateral inheritance tax, although such proceeds are brought within the state for distribution. *Matter of Swift*, 644.

31. Personal property located without the state remitted to this jurisdiction for distribution is not subject to the collateral inheritance tax. *Id.*

32. By the will of deceased it was directed that all legacies and devises therein made should be free of succession or other tax, and that such tax should be paid by the executors as part of the expenses of the administration. *Held:* That the amount of the collateral inheritance tax should not be deducted from either the specific or residuary legacies in ascertaining the value thereof as subject to the tax. *Id.*

33. Where, by his will, testator gives certain paintings, pictures, plate and various other articles to certain persons, but three of whom are taxable under the collateral inheritance tax, it is error to impose the tax upon the aggregate value of the property thus bequeathed. To the extent that this aggregate valuation represents property bequeathed to persons exempt by reason of their relationship to the deceased or by reason of their receiving, under all the provisions of the will, beneficial interests less than five hundred dollars in value, it is not taxable. *Id.*

COMPROMISE OF CLAIM.

A petition to the Surrogate for leave to compromise a claim must contain all the facts and circumstances warranting an acceptance of a less sum than the face of the claim, before the compromise will receive the sanction of the Surrogate. The same evidence should be before the

Surrogate on this *ex parte* application that would be required to justify the same if attacked upon an accounting. *Matter of Richardson*, 276.

CORPORATION.

To entitle a foreign corporation to take a legacy under a will proved in this state, there must be legal proof not only that the foreign corporation has existed, but that it did exist as such at the time of the death of the testator. Without such proof, it is incompetent to take, and the legacy does not fall into the residuum, but lapses as if undisposed of. *Matter of Gehrig*, 21.

COSTS.

1. Where a person has taken possession of certain personal property belonging to the estate of a decedent, and which he has delivered to others, under a claim that he has done so in accordance with the wishes of decedent, the burden is on such person to show that such property is not still under his control, and in the absence of such proof, his failure to repair his former illegal action is a withholding. In such a case, where the respondent is an interloper, who gained control illegally of the property, and has unwillingly disclosed information with reference to its existence and whereabouts, and was disingenuous in answering interrogatories of examining counsel, such person may be charged with the costs of the proceeding to discover the property. *Matter of Nickerson*, 6.
2. Costs recovered by a creditor in an action against the executrix to establish his claim against the estate are entitled to priority of payment over the debts of the testator. *Matter of Randell*, 29.
3. Costs cannot be allowed out of an estate to an unsuccessful contestant of the will (Code Civ. Proc., § 2558), and the court being without jurisdiction to so decree, a consent of the parties to the award of such costs to the unsuccessful party cannot confer jurisdiction. *Matter of Keeler*, 45.
4. Correspondence between the counsel for the parties as to the amount and manner in which the costs shall be decreed, containing propositions not accepted, together with a subsequent verbal acceptance, does not comply with the rule of the courts (Rule 11) that such agreement shall be in writing, and is not binding. *Id.*
5. Where a contest of a will is made in good faith and on substantial grounds, the proponent's costs will be paid out of the estate and not by the contestants personally, especially where contestants fail to appear at the trial for the reason that they relied upon a settlement proposed by the counsel for the proponent being carried into effect. *Id.*

COUNSEL FEE.

1. An accounting party is not confined to sections 2561 and 2562 of the Code of Civil Procedure in remunerating his counsel, but may expend

such sums as he deems proper in that behalf, to be included in his accounts, and the correctness and propriety of which may be contested by the persons interested. *Matter of Smith*, 418.

2. But to justify such items in an account it must appear that services beyond the ordinary preparation of the account, or for trial, were rendered and were necessary. *Id.*

See EXPENSES OF ADMINISTRATION.

CREDITOR OF ESTATE.

1. One who subsequent to the death of a testator has sold goods to a firm composed of the surviving partner of testator and the executor and executrix, as such, of testator, which business was continued under a provision of the will that the executor could only devote to the purposes of the business so much of the estate as was already at testator's death invested therein, is not a creditor of the estate, and cannot as such apply under section 2685 of the Code of Civil Procedure for revocation of letters testamentary issued to the executors of deceased. *Matter of Stern*, 204.

2. Such creditor has only a remedy so far as the estate of decedent is concerned, against the assets embarked in the business which are simply an investment of the estate, and has no claim against the executors and executrix as such. *Id.*

CROPS.

1. Where land upon which a crop is growing is so devised by testator as to convey it to the devisee, unless a contrary intention plainly appears from the will the crop is on the footing of a chattel specifically bequeathed to the devisee. *Matter of Clemans*, 237.

2. In such case the crop cannot be sold for the payment of general legacies, and can be applied to the payment of debts only after other assets not specifically bequeathed have been so applied. *Id.*

3. A clause in the will of testator which provides that after the payment of testator's debts "if anything is left from the personal property it shall be equally divided between my children share and share alike" does not apply to growing crops on land specifically devised. *Id.*

DECREE.

A decree judicially settling the account of an executor will not be reopened upon allegations on the part of the executor that he has by error charged himself as executor with assets which do not belong to the estate. *Matter of Watts*, 415.

See GUARDIAN, 2.

DESTROYED WILL.

See PROBATE OF WILL, 4, 5, 6, 7.

DISCOVERY OF PROPERTY.

Where, on application of the administrator for discovery of the property of the deceased, for appraisement, the answer of the respondent shows that previous to death of decedent, assets of the decedent came rightfully into the possession of respondent, with the right to dispose of them; and that they have rightfully remained in his hands subsequent to the death of decedent, by virtue of respondent's contract with the representatives of decedent, the application for discovery will be denied. *Matter of Cunard*, 16.

DIVORCE.

1. Decedent, a resident of the state of New York, intermarried therein with one Mary F. also a resident thereof. Thereafter decedent left the state, and after remaining over a year in Ohio, commenced an action for divorce against his wife for a cause which was sufficient under the laws of Ohio. The wife was not in Ohio at the time of the commencement of the action, nor was she ever a resident of that state. She did not appear, nor was she served personally or by mail in that action. A commission was issued therein to take testimony in this state. The wife was notified of the time and place of the hearing, and admitted in writing due personal service of a copy of the notice and taking of the depositions, and gave a consent that depositions might be taken and witnesses summoned in the cause, without further notice to her.

2. After his divorce, decedent intermarried in Michigan, and left his second wife him surviving: *Held*, that the decree of divorce was absolutely void as to his wife, Mary F., and that upon his death she was entitled to letters of administration upon his estate. *Matter of House*, 524.

ESTOPPEL.

The daughter and her children who were beneficiaries under the will of testator were duly cited to appear on a settlement of the accounts of the executor, and did not at such time make a claim that there was a trust in their favor impressed upon the funds of the estate. They subsequently claimed that they were not estopped by their not having set up this claim, for the reason that the trust fund formed no part of the estate of testator. *Held*, that the daughter and her child were estopped from claiming that the executor held a trust fund for them. *Matter of Crise*, 59.

See ADMINISTRATRIX WITH WILL ANNEXED, 8.

EVIDENCE.

1. Statements made by a testator to his physician made while he was in attendance upon him, which the physician testifies were not necessary to enable him to act in his professional capacity, are admissible in evidence in probate proceedings. *Matter of Halsey*, 220.

2. The rule that the burden of proving payment is upon the party alleging it, applies to the litigation of a claim against the estate of a decedent upon a promissory note made by such decedent, to which the defence of payment is interposed. *Matter of Macomber*, 279.

3. Legal advice given in casual conversations in the street, for which compensation is neither asked for nor expected, is not a privileged communcation. *Matter of Monroe*, 395.

4. The testimony of experts upon the question of mental capacity, although admissible and a great aid to court and jury, can never be held to be controlling as against the testimony of intelligent persons who saw daily the person whose mental condition is in question, and had with him transactions of a social and business nature. *Matter of Kiedaisch*, 438.

See COSTS, 1.

EXECUTION

1. The recovery of costs against an administratrix, in an action brought by her for an injury to property of decedent, does not give defendant priority over the other creditors of the intestate. And before an execution issues in such case, it should appear that there are assets sufficient to pay all the debts of decedent or, at least, an account should be filed, showing fully the assets and debts to be paid therefrom, so that the execution would direct only the application of the "just proportion of the assets" of the estate to the payment of the judgment. *Matter of Boyle*, 57.

EXECUTION OF WILL.

1. One of the witnesses to the will of the decedent had drawn up the will in her presence. This instrument was spoken of by that witness in the hearing and presence of the other witness, and in the presence of the decedent immediately before the execution and attestation, as the will of decedent. She signed it with her mark. Upon the proceedings for the probate of the will the witness who had drawn up the will being dead, the other witness testified that he had signed the will as a witness before the testatrix had made her mark. *Held*, that the will must be admitted to probate, as there was proof of its due execution and attestation, as the testimony of the witness that he had signed before testatrix, could be presumed to be erroneous, from the facts, which as appeared by the evidence, accompanied the execution of the will, showing that his recollection of the order in which it was signed was incorrect. *Matter of Kane*, 249.

2. The subscription of a will by the mark of the testator may be proved after evidence of the handwriting of a deceased witness, by the surviving witness, if his testimony convinces the court of its truthfulness. *Id.*

3. The fact that two witnesses to a will disagree as to material facts in regard to its execution is not sufficient of itself to defeat the probate

of the instrument. Neither the forgetfulness nor perversity of one of the witnesses should prevent the probate, if it can be ascertained from any source that the formalities required by the statute have been complied with. *Matter of Bedell*, 328.

4. One of the witnesses to the will of testatrix was her attorney who had drawn the will under her instructions. He testified fully to facts showing the due execution and publication of the will by testatrix, and his testimony was supported by the attestation clause, which in addition to the matters usually contained therein, recited that testatrix acknowledged her signature at the time of making it. The other witness who was confused and gave contradictory evidence, testified that she did not see testatrix sign her will or hear her acknowledge her signature. *Held*, that the proof was sufficient to justify the admission of the will to probate. *Id.*

5. Where a will is executed by the testatrix in the same room and in presence of the witnesses, testatrix being in such a position that the witnesses could have seen her write if they so desired, the fact that one of the witnesses did not see the actual motion of testatrix's pen because she refrained from looking at her upon testatrix's statement that doing so would make her nervous, does not render the will invalid for a non-compliance with the statute, (2 R. S., p, 63, § 40, subd. 2,) which requires the execution of a will in the presence of each of the subscribing witnesses. *Id.*

6. Where one witness to a will, at the request of the other witness who is prevented from signing by physical disability, signs the name of that witness to the will, this is a sufficient signature to comply with the statute. (4 R. S., 8th ed., p. 2547, § 40, subd. 4.) *Matter of Strong*, 574.

7. Before subscribing her will testatrix declared in the presence of the witnesses that it was her last will and testament and requested them to sign the same as witnesses. Testatrix immediately thereupon signed her name to the will, and the witnesses, as soon as she had subscribed her name, signed the will in her presence, as witnesses. *Held*, that this was a compliance with the statutory requirements as regards the execution of a will. 2 R. S., p. 63, § 40. *Matter of Williams*, 579.

8. On a contested application for the probate of a will the question was raised as to the genuineness of the signature of testatrix. The name of testatrix at the commencement of the will, in the attestation clause and signature, was written "Roxa Lany Williams." The contestants introduced in evidence papers, executed by testatrix at about the time of the execution of the will, to which testatrix signed her name as "Roxalana Williams," and there was evidence also that since the execution of the will testatrix had denied that she had made a will. The name was usually written in one word "Roxalana," but it appeared that she had on one or more occasions signed her name "Roxa L. Williams," and her silver spoons and pillow cases were marked "R.

L. W." and "R. L. H." In her will she gave certain spoons marked "R. L. H." to one of the legatees.

Proponents also produced several papers signed by testatrix many years before her death to which her christian name was signed, "Roxa Lany," and "Roxa L.," and also a deed from her brother in which she was named as grantee as "Roxa L. Williams." A number of experts were called on both sides, but the greater number testified that the signature of the will was genuine. The positive testimony also of the two witnesses to the will showed that they saw testatrix affix her signature to the will. *Held*, that the will should be admitted to probate as the signature was shown to be genuine. *Matter of Williams*, 579.

See PROBATE OF WILL.

EXECUTORS AND ADMINISTRATORS.

1. Where a claim of the administrator against the estate is assigned by him without consideration, by an assignment which is merely colorable and is referred as a disputed claim, and the administrator fails to interpose the defence of the Statute of Limitations, when such a defence is apparently available, allowing, without objection, incompetent evidence to be offered in support of the claim; in such case the judgment allowing such claim as well as all claims for cost and expenses in connection therewith will be set aside and disallowed. *Matter of Hill*, 25.

2. An administrator is bound to set up the bar of the Statute of Limitations when it is available, and will not be allowed on his accounting any sum paid upon a debt which at the time of its payment was barred by the statute. *Id.*

3. The claim to an account of profits cannot stand with one that the executrix must be charged with the value of the good will of the business. The two are inconsistent. One proceeds upon a theory that the business was conducted as that of the estate; the other, that the business with the good will passed to the individual benefit of the executrix. She cannot be held for both. *Matter of Randell*, 29.

4. Where an executrix, not knowing of the insolvency of an estate, has paid certain claims in full, she is, upon her accounting, entitled to credit only for the amount which should have been paid upon these claims *pro rata*, and she loses the excess over that amount paid by her. *Id.*

5. Real estate of the testator subject to a mortgage held by one of the executors was sold, with the agreement that the purchaser thereof should assume the mortgage. The whole purchase money, however, was paid to the executors, and was retained by them uninvested. *Held*, upon the executor's accounting that the mortgage should be treated as if paid to the time of the sale, and that the estate should not pay interest thereon after such time. *Matter of Babcock*, 82.

6. One of the executors held a note of testator for interest then overdue on a mortgage. The executor, without having this debt proved to or

allowed by the Surrogate, as required by statute, 2 R. S. 88 (8th ed., p. 2561), § 33, paid this note out of the funds of the estate, which, as it afterwards appeared, were insufficient to pay all the debts. *Held*, that he had no right to do this, and *Further held*, that having treated the note as payment of the interest, he could not afterwards ignore the note, and claim that it was merely evidence of the debt, and that the interest was therefore still due by the estate. *Id.*

7. An executor of an estate who has deposited funds belonging thereto in a bank of which he was president and principal stockholder, and which funds have remained in said bank without drawing interest for over a year, will be charged with interest thereon at the rate paid by that bank on time deposits. *Id.*

8. Where an executor receives as part of the assets of testator a note then due, made by a solvent person resident in another state, and who is then the owner of a farm of a value much greater than the amount of the note, the executor is liable for the amount of such note, where instead of endeavoring to collect the same, he waits until other liens have matured against the farm, and it has been sold on execution, and he then takes a new note for the amount of the debt, which turns out to be worthless, by reason of the then insolvency of the maker. *Matter of Millard*, 91.

9. The testator bequeathed to his wife, absolutely, his household furniture, and in another clause of the will bequeathed and devised to her "all the residue and remainder of my real and personal estate, to be used for personal benefit during her natural life." By the same clause the executor was authorized, with the advice and consent of the wife, to sell any part or all the real and personal estate of testator, the use of the money arising therefrom to be given to the wife for her benefit and support during her natural life. After her death, certain legacies were given to testator's daughters, the remainder of the estate to be divided among all his heirs. The payment of the legacies after the widow's death would nearly exhaust the whole of the residuary estate. *Held*, that the widow was entitled only to the use or income of the residuary estate during life, and that it was the duty of the executor to preserve the principal for distribution to the legatees after the widow's death. *Id.*

10. The executor with the advice and consent of the wife, under the clause of the will cited in the preceding paragraph, sold part of the real estate of testator, and paid the proceeds thereof partly to the wife, and partly to himself on account of a legacy given to him by the first paragraph of the will. *Held*, that he must account for the sums so paid by him. *Id.*

11. Where part of the estate of testator consists of a tenement house, and it appears that a housekeeper and janitor are necessary to care for the property, and that it is customary to allow such housekeeper and janitor to occupy an apartment in the house free of rent, in addition to paying about thirty dollars a month wages, an agreement made by the

executors with the widow of a testator, who was also executrix, to perform the duties of housekeeper and janitor of said building, in consideration of receiving free of rent, the same apartments she occupied before the death of the testator, will not be disturbed. *Matter of Merkle*, 97.

12. Where a will directs the investment of a specified sum; that the income thereof be paid to the life-tenant and that at his death the principal be divided among certain named persons in specified shares, the remaindermen in such case take a vested remainder at the death of the testator, and in case of the death of any one of the remaindermen prior to that of the life-tenant, the personal representatives of such deceased remainderman are entitled to his share upon the death of the life-tenant. *Id.*

13. Where in such case the executor under testator's will has died before the distribution of the remaindermen's shares, such shares should be received and distributed by an administrator c. t. a. of the testator and not by the executor of the deceased executor. *Matter of Post*, 243.

14. Where after the death of an intestate, one of the next of kin dies, and no administrator of such next of kin has been appointed, the administrator of the intestate must hold the share of the deceased next of kin until some one entitled to receive it shall appear and then it must be the subject of a further accounting by the administrator. *Matter of Paine*, 266.

15. The executor of a will, who is the chief beneficiary thereunder, whose relations with most of the testator's heirs and next of kin are unfriendly; who has large unsettled transactions with the estate, and who is charged by the contestants, having exercised undue influence over the testator, should not be appointed temporary administrator, pending the contest of the will. *Matter of Sterns*, 272.

16. Where the assets of the estate have been purchased by an executor in violation of law, and by reason of the circumstances it is inexpedient or very difficult to obtain a fair value of such assets upon a re-sale, the Surrogate will not set aside the sale, but will surcharge the executor's account with the difference between the amount realized on the sale and the value of the property sold as shown by the executor's inventory. *Matter of Bach*, 490.

17. Two pictures belonging to the estate were sold at auction very much below their value, to a daughter of one of the executors, through instructions conveyed from the daughter to the auctioneer through that executor. Each executor purchased from this daughter one of the pictures at a sum immensely below their inventoried value. *Held*, that a re-sale of the pictures should be ordered. *Id.*

18. Three persons, A. H. and S., who were executors in and trustees under a will, qualified, but only two of them, H. and S., took any active part in the management of the estate, dividing the assets of the estate between them and receiving the income. H. kept the books of the estate, entering thereon all the receipts and disbursements made by

himself as well as those reported to him by S., and he made periodical statements from such books to S., who disbursed the income of the entire estate to and for the benefit of the beneficiary. H. died insolvent, and it was found had appropriated to his own use part of the assets of the estate. *Held*, that neither of the other trustees was guilty of negligence in not examining the books of the estate kept by H., and were therefore not liable for the amount misappropriated, without their knowledge, by the trustee, H. *Matter of Cozzens*, 622.

19. Executors and trustees under a will, who loan to one of their number assets of the estate on his personal note, secured by collateral of a railroad bond, are liable to the estate for the loss caused by the insolvency of the maker of the note, and the fact that the said maker had no title to the bond which he had pledged as security. *Id.*

See ACCOUNTING, 16; BUSINESS OF TESTATOR, 1–4; COLLATERAL INHERITANCE TAX, 12, 18, 24; INVESTMENTS, 1–4.

EXPENSES OF ADMINISTRATION.

Counsel fees, and such other expenses as may be incurred by an administrator under section 2562 of the Code of Civil Procedure, are actual expenses within the meaning of section 2557 of that Code, and may be allowed to the administrator by the surrogate, even though the estate out of which they are directed to be paid amounts to less than one thousand dollars. *Matter of Van Kleeck*, 14.

EXPERTS.

See EVIDENCE, 4.

FOREIGN CORPORATION.

See COLLATERAL INHERITANCE TAX, 24; LEGACY, 1.

GIFT.

Testator during his last illness, gave his son some keys and told him that everything was to be his. The son claimed that this was a gift of the household goods of the deceased, and that the keys given to him were those which gave access thereto.—*Held*, that this was not a present gift, but had reference to the future, and that there being no evidence of the identity of the keys it would not be assumed that they were those giving access to the household goods of deceased. *Matter of Somerville*, 86.

GOOD WILL.

1. The good will of the business of a testator does not include the right to use that testator's name, and where an executrix has not taken the necessary legal steps under Laws 1880, ch. 561, amended Laws, 1881, ch. 389, allowing the use of the name of a deceased person in business to acquire the right to use such name, she should not be charged for

the use thereof as a part of the good will of the business. *Matter of Randell*, 29.

2. The good will of a business of a decedent is to be accounted for by the executrix, and when the executrix has taken possession of and conducted a store business previously owned by her testator she will be charged with the value of the good will. *Id.*

See ACCOUNTING, 2.

GUARDIAN.

1. Under section 2852 of the Code of Civil Procedure, a person who is appointed guardian upon the happening of a future event, *e. g.*, when he shall attain his majority, who does not qualify within thirty days, or if the Surrogate shall extend the time, within three months after the attainment of his majority, will be deemed to have renounced the appointment as guardian. *Matter of Constantine*, 1.

2. The general guardian of an infant filed a petition praying for the judicial settlement of his accounts, and a decree revoking his letters of guardianship. The application was partly based upon allegations of the guardian that disputes and disagreements had arisen between the guardian and the trustee of the estate; that unfriendliness between himself and the trustee of the estate existed, and that the minor desired some other person than himself to be appointed her general guardian. Upon the presentation of the decree upon the accounting, for settlement, it was *held:* that as, notwithstanding the discharge of the guardian in this proceeding, another settlement of his account might be compelled, (Code Civ. Proc., § 2837,) the decree should judicially settle and state the account as between the guardian and ward, showing the balance which existed in favor of the guardian without any direction whatever as to its payment.

Further held, that under the circumstances recited, the infant should bear all the allowance awarded to the special guardian upon the accounting, and that the general guardian should be disallowed all costs beyond the ordinary costs of an accounting without contest. *Matter of Wright*, 108.

HUSBAND AND WIFE.

1. A provision in a will by a married woman in favor of her husband will not, unless so declared in express terms, be held to be in lieu of the articles of personal property which under Laws 1887, ch. 630, § 13, the husband is entitled to have set apart by appraisers out of the estate of his deceased wife. *Matter of Harris*, 4.

2. Upon the death of a married woman intestate and leaving no descendants, her interest in an insurance policy of which she is the beneficiary is a chose in action which vests in her husband, notwithstanding the fact that it has not been reduced to possession. *Matter of Warner*, 347.

INFANT.

See GUARDIAN.

INSURANCE.

Upon the death of a married woman intestate and leaving no descendants, her interest in an insurance policy of which she is the beneficiary is a chose in action which vests in her husband, notwithstanding the fact that it has not been reduced to possession. *Matter of Warner*, 347.

INTEREST.

1. On a payment which a testamentary trustee is ordered to make by a decree, simple interest and not interest with annual rests, nor compound interest should be charged. *Matter of Lawrence*, 53.

2. Real estate of the testator subject to a mortgage held by one of the executors was sold, with the agreement that the purchaser thereof should assume the mortgage. The whole purchase money, however, was paid to the executors, and was retained by them uninvested. *Held*, upon the executor's accounting, that the mortgage should be treated as if paid to the time of the sale, and that the estate should not pay interest thereon after such time. *Matter of Babcock*, 82.

3. One of the executors held a note of testator for interest then overdue on a mortgage. The executor, without having this debt proved to or allowed by the Surrogate, as required by statute, 2 *R. S.* 88, (8th ed., p. 2561,) § 33, paid this note out of the funds of the estate, which, as it afterwards appeared, were insufficient to pay all the debts. *Held*, that he had no right to do this, and *Further held*, that having treated the note as payment of the interest, he could not afterwards ignore the note, and claim that it was merely evidence of the debt, and that the interest was therefore still due by the estate. *Id.*

4. An executor of an estate who has deposited funds belonging thereto in a bank of which he was president and principal stockholder, and which funds have remained in said bank without drawing interest for over a year, will be charged with interest thereon at the rate paid by that bank on time deposits. *Id.*

5. Where an administrator, acting in good faith, has allowed the funds of the estate to remain idle he will be only charged with simple interest thereon. It is only in cases of gross negligence or bad faith that he can be charged with compound interest. *Matter of Kennedy*, 216.

6. A legacy, not payable out of the residue of the estate, given to an adult child of testator for support, draws interest from the date of the death of testator at the rate which the fund, if invested as directed by the will, would produce. *Matter of Lasak*, 380.

7. Where a parent gives a legacy to a minor child and no other provision for its support is found in the will, the legacy presumptively draws interest from the death of the testator, but the absence of such provision creates a presumption only, which may be overthrown by evidence in the will itself of a contrary intention, or the presumption may be repelled by evidence extrinsic to the will that the infant had other means of support. *Matter of Vedder*, 548.

8. The testator by his will gave to his wife for life the income and profit of his estate during her life, and upon her death disposed of the whole estate. Among the legacies was one of eight thousand dollars to a minor whom he called his adopted daughter. This child had been indentured in early childhood by a charitable institution to testator and his wife, and by the instrument of indenture testator and his wife agreed to receive the apprentice as an adopted child, to be maintained, educated, clothed and treated as far as practicable by them as if she were in fact their child. The child was treated by them as their own child, and on testator's death, continued to live with, and to be supported by testator's widow. *Held*, that the legacy to the child did not draw interest from the death of testator. *Id.*

See COLLATERAL INHERITANCE TAX, 10; LEGACY, 7.

INTERMEDIATE ACCOUNT.

See ACCOUNTING, 9, 11.

INVESTMENTS.

1. Except under special circumstances, the investment by an executor of the funds of the estate in personal security, is a breach of trust, and for any loss arising therefrom, the executor is liable. *Matter of Blauvelt*, 453.

2. Where executrices who held a first mortgage belonging to the estate allow it to be paid and then re-invest the proceeds in a second mortgage on the same property, the two mortgages aggregating the full value of the property, this is a breach of trust which will render them chargeable with any loss arising therefrom. *Id.*

3. While the circumstance of an investment on second mortgage by an executor is one of importance upon the question of the exercise of proper care, yet it only calls for the exercise of greater caution in making the investment, for there is no rule of law prohibiting the investment of trust funds in any other than first mortgages. *Id.*

4. Where a loan by an executor upon mortgage is a safe one when made, such executor will not be held liable for a loss arising from the sudden depreciation of the mortgaged property by reason of a general financial panic. *Id.*

JUDGMENT.

The recovery of a judgment for costs by a defendant against the administratrix of a decedent, in an action brought by her to recover damages for injury by negligence to property of deceased does not give defendant any priority over the other creditors of the intestate. *Matter of Boyle*, 57.

See CLAIM AGAINST DECEDENT, 1; JURISDICTION, 2.

JURISDICTION.

1. The Surrogate has power to determine whether or not a judgment

against an estate is invalid by reason of want of jurisdiction by the court in which such judgment was rendered over the representative of the estate against whom it was recovered. *Matter of Radde*, 293.

2. A judgment recovered against an executor or administrator in his representative capacity in the City Court of New York is void for want of jurisdiction even though the court had jurisdiction of the subject matter of the action and the executor or administrator voluntarily appeared and answered. *Id.*

3. The Surrogate has power to compel the payment of the collateral inheritance tax, as one of the steps in the final adjustment and settlement of the estate. *Matter of Vanderbilt*, 319.

See ASSIGNMENT, 2, 3; COSTS, 3.

LEGACY.

1. To entitle a foreign corporation to take a legacy under a will proved in this state, there must be legal proof not only that the foreign corporation has existed, but that it did exist as such at the time of the death of the testator. Without such proof, it is incompetent to take, and the legacy does not fall into the residuum, but lapses as if undisposed of. *Matter of Gehrig*, 21.

2. A testator gave a specified sum to his executors in trust for his nephew to "be so managed and used as will best promote the future welfare, comfort and happiness of the said" nephew, and for that purpose left "the disposition and management of the said sum, both interest and principal, should it be necessary, to the better judgment and discretion of" his executor. *Held:* That the legacy vested in the nephew at the death of the testator, subject only to the control of the executor during the life of the nephew, and at his death passed to his legal representatives and not to the residuary legatees of testator. *Matter of Brooks*, 172.

3. Legacies given in lieu of dower, even though they be many times the actual value of the dower right released, do not abate if the estate is insufficient to pay all legacies in full. *Id.*

4. A legacy, not payable out of the residue of the estate, given to an adult child of testator for support, draws interest from the date of the death of testator at the rate which the fund, if invested as directed by the will, would produce. *Matter of Lasak*, 380.

5. A bequest to an executor to expend the sum of two hundred dollars "as my executors may deem best, within the time prescribed by the statute, governing perpetuities, in keeping my burial plot in good condition," is void under the Revised Statutes (1 *R. S.*, p. 773, § 1,) which authorizes certain limitations based on life or lives, but not at all upon time. *Matter of Fisher*, 75.

6. Such bequest is also void, because there is no person, beneficially or otherwise interested who could compel an employment of the fund as testatrix intended. *Id.*

7. The gift of the residue for life, will entitle the residuary legatee to such interest as may have accrued up to the end of the year after testator's death, and then, interest on the amount of the fund as afterwards ascertained to from that first year. *Id.*

8. Where services have been rendered and board furnished to one since deceased, upon his promise to compensate the person rendering and furnishing the same therefor, if the will of the promisor contains a legacy to the promisee sufficient to cover only a part of his claim, the legatee can recover the balance due; but where the testamentary provision to the promisee equals or exceeds the just amount of it, the claim is extinguished. *Matter of Somerville*, 86.

9. A direction in a will that the payment of a general legacy must be made as soon after testator's death as the circumstances of his estate shall render such payment convenient, does not amount to a special direction that the payment must be made earlier than the time prescribed by law, nor does such a legacy to one to whom the testator does not stand *in loco parentis*, draw interest from the time of the death of the testator. *Matter of Gibson*, 125.

10. Interest on a general legacy begins to run in one year from the death of the testator, although such legacy is by the statute (2 *Rev. Stat.*, p. 90, § 43) not payable until after the expiration of one year from the granting of letters testamentary. *Id.*

See CROPS, 3; INTEREST, 6, 7, 8; PRACTICE, 11.

LETTERS OF ADMINISTRATION WITH WILL ANNEXED.

Upon the death of a residuary legatee after the death of testator but before the will is admitted to probate, the right to take out letters of administration with the will annexed on the estate of testator passes, not to the representatives of the residuary legatee, but to the next class named in the statute, (Code Civ. Proc., § 2643,) to wit; to principal and specific legatees. *Matter of Brown*, 386.

LIFE TENANT AND REMAINDERMAN.

See EXECUTORS AND ADMINISTRATORS, 9, 12; PRINCIPAL AND INCOME, 1-4; WILLS, 9.

LUNATIC.

See ACCOUNTING, 16, 18.

MARRIAGE.

Upon the application for the probate of the will of testator it became necessary to determine as a preliminary question whether or not one E. S., an alleged widow of testator, had been in fact his lawful wife, and as such had the right to appear and contest the probate of his will. The alleged widow had gone through a marriage ceremony with testator, but it was alleged that at the time of this marriage she had been

already married to a person, one J. M., who was still living at the time of her marriage to testator, and from whom she had not been divorced. The facts as to the first marriage were as follows: The alleged widow E. S., and J. M. had cohabited together for years, but there has been no ceremonial marriage. At the time when J. M. had become a total imbecile, E. S. told a witness that she was tied to him by her sense of obligation to him as his wife, because prior to that time she had been married to him and he had been a good husband, and that she had been advised by some of her friends in consequence of his condition, his habits, his drunkenness and his utter worthlessness to get a divorce from him. J. M. in her presence testified on a trial that he had met her several years before at Philadelphia and had married her, and that she was his wife. And it also appeared that her brother had written her name and that of J. M. upon a hotel register as man and wife. Upon the application for the probate of the will of testator, E. S. testified that she had never been married to J. M., and she first testified that she had not and then testified that she had been his mistress. *Held*, that this evidence showed a marriage between E. S. and J. M., and said marriage never having been dissolved, the subsequent marriage of E. S. to testator in the lifetime of J. M. was a nullity, which gave her upon his death no standing in court to contest his will. *Matter of Hamilton*, 471.

PARTNERSHIP.

See BUSINESS OF TESTATOR.

PRACTICE.

1. The objection that a judgment against the estate has been recovered by the negligence and collusion of the administrator, may be taken by exception to the report of a referee allowing such item upon an accounting. *Matter of Hill*, 25.
2. An executrix took possession of a store which had belonged to the testator, under claim that she was the purchaser of the stock of goods and fixtures, and thereafter conducted the business on her individual account. Objections having been filed to her account by creditors, the issues thus raised were litigated. The creditors sought to charge her with the value of the goods at the time she took possession of the store and offered no evidence as to profits. *Held*, that the creditors could not, for the first time, by their brief filed upon the judicial settlement of the account, charge the executrix with the profits of the business, there having been no evidence offered by them upon that issue. *Matter of Randell*, 29.
3. A legatee duly cited, who has filed no objections to an executor's account, is not entitled to cross-examine the executor in relation thereto. *Matter of Gilman*, 78.
4. The provisions of Section 414, Ch. 4 of the Code of Civil Procedure, providing that the word "action" is to be construed when necessary

so to do, as including a "special proceeding," limit the remedy in the Surrogate's courts just as absolutely as the various remedies in other courts are limited, and in regard to proceedings in Surrogate's courts the chapter must be read as if "special proceeding" were substituted whenever the word "action" occurs. *Matter of Nicholls*, 156.

5. Where it is sought to set aside and revoke or vacate a decree admitting to probate a will of personal and real property, the proceeding must be taken under subdivision 6 of section 2481 of the Code of Civil Procedure, which authorizes the Surrogate to open, vacate, modify or set aside in certain cases a decree of his court. *Matter of Hamilton*, 268.

6. The provisions of sections 2647 *et seq.* of the Code do not apply to the revocation of such a will, as they relate exclusively to wills of personal estate only. *Id.*

7. The decision of the Surrogate upon a question of fact arising upon proceedings for the probate of a will, is equivalent in its effect to the verdict of a jury. *Matter of Hamilton*, 471.

8. The Surrogate has power to approve the account of an executor to which objections have been filed but which is correct in every particular and so admitted in open court by the attorney for the objector, when no vouchers are or can be produced for several items thereof. *Matter of Langlois*, 481.

9. Where the assets of the estate have been purchased by an executor in violation of law, and by reason of the circumstances it is inexpedient or very difficult to obtain a fair value of such assets upon a re-sale, the Surrogate will not set aside the sale, but will surcharge the executor's account with the difference between the amount realized on the sale and the value of the property sold as shown by the executors' inventory. *Matter of Bach*, 490.

10. Two pictures belonging to the estate were sold at auction very much below their value, to a daughter of one of the executors, through instructions conveyed from the daughter to the auctioneer through that executor. Each executor purchased from this daughter one of the pictures at a sum immensely below their inventoried value. *Held*, that a re-sale of the pictures should be ordered. *Id.*

11. Where under the provisions of a will the executors are also created testamentary trustees to pay certain rents and profits of land to certain legatees, an application by such legatees to compel a payment of income to them must be made under sections 2804 and 2805 of the Code of Civil Procedure, relating to compelling the payment of a debt or legacy by testamentary trustees, and not under sections 2717 *et seq.* of that Code, which prescribe the method of enforcement of claims of legatees or creditors against executors or administrators. *Matter of Byrnes*, 522.

See ACCOUNTING, 18; STATUTE OF LIMITATIONS, 12.

PRINCIPAL AND INCOME.

1. The premium derived from the sale of securities in which the principal

of a trust fund is invested, should be credited to the principal account, to go eventually to the one who shall be entitled to receive the corpus of the estate, and not to the income account, payable to a life beneficiary. *Matter of Lawrence*, 53.

2. The proceeds of the sale of part of the property of a corporation, apportioned by a resolution of the directors among the stockholders, are capital and not income, and therefore belong, not to a life tenant of an estate, but to the capital account thereof. *Matter of Skillman*, 161.

3. Testator bequeathed to his wife the use, interest and income during life of the residue of his estate, with the remainder over as to principal. A part of the personal estate consisted of bank stock. After testator's death, the bank reduced its capital stock by returning to its stockholders one half thereof, and declared a dividend derived from earnings of forty per cent on the one half returned of the capital stock. Regular semi-annual dividends were declared and paid upon the stock both before and after the reduction. *Held*, that the forty per cent dividend was income which was payable to the widow. *Matter of Warren*, 411.

4. The increase from natural causes in the value of real and personal property of an estate held by executors as an investment, does not constitute profits, and therefore does not go to a life tenant to whom are given the "income and profits" of such estate during life, but such increase becomes principal and goes to the remaindermen. *Matter of Vedder*, 548.

5. *Semble*, that increase in the value of securities held by an estate of a decedent does not become "profits," and payable to the person who by the terms of the will is entitled to "profits," until the actual sale of the securities and the receipt of the increased value thereof. *Id.*

PRIORITY OF PAYMENT.

1. Costs recovered by a creditor in an action against the executrix to establish his claim against the estate are entitled to priority of payment over the debts of the testator. *Matter of Randell*, 29.

2. The recovery of a judgment for costs by a defendant against the administratrix of a decedent, in an action brought by her to recover damages for injury by negligence to property of deceased does not give defendant any priority over the other creditors of the intestate. *Matter of Boyle*, 57.

PRIVILEGED COMMUNICATIONS.

See EVIDENCE, 1, 3.

PROBATE OF WILL.

1. Where a will is, on its face, properly executed and attested, and one of the witnesses thereto testifies that she was not asked to sign the will as witness, the will should notwithstanding be admitted to probate, where the recollection of the witness is evidently defective or perverse, and where the other subscribing witness who had drawn the will, and

also a third person present at the time of the execution, both testify that such witness was, in fact, requested to sign by testator. *Matter of Frey*, 70.

2. Where a will has been found in the safe of testatrix carefully preserved among her valuable papers, with the signature erased, and then carefully restored, this, in the absence of other proof, does not raise a presumption of an intention to revoke the will, and such will should be admitted to probate. *Matter of Wood*, 144.

3. Where one of the subscribing witnesses to a holographic will testifies to the due execution of the instrument and where the surrounding facts and circumstances tend to support such evidence, the paper will be admitted to probate although the second witness testifies that the will was not duly executed. *Matter of Stillman*, 207.

4. To entitle the admission to probate of a will destroyed in the lifetime of testator, it is necessary to prove an actual fraud against testator in the destruction of his will. *Matter of De Groot*, 210.

5. The provisions of section 1865 of the Code of Civil Procedure requiring that the provisions of a destroyed will shall be distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness, are to be liberally construed. *Id.*

6. Upon an application to admit to probate a will which had been destroyed in the lifetime of deceased, it appeared that it had been executed with due deliberation, bequeathing and devising everything to a person to whom she was engaged to be married. Although she had abundant opportunity, had she so wished, to destroy the will testatrix did not do so, but it was on the morning of the day of her death destroyed out of her presence by her brother under circumstances indicating stealth in the preparation for its destruction. In addition to some testimony as to the expressed intention of testatrix the only evidence tending to prove that the destruction of the will was by direction of deceased was that of the brother, and that was full of contradictions and improbabilities. The testimony of a servant showed that on the morning of the day of the destruction of the will testatrix thought the will was still in the box where it had been kept, and that she had not changed her testamentary intent or her sentiments towards her intended husband up to that time. *Held*, that this evidence was sufficient to show a fraudulent destruction of the will. *Id.*

7. Testatrix had made a holographic will which she delivered to her attorney with directions to draw a new will containing the same provisions. The draft of the new will made by the attorney was produced before the Surrogate and it was shown that this draft corresponded word for word with the will afterwards executed, except in two specified particulars. One C. dictated from the draft to the attorney M. and both these witnesses testified as to the correspondence of the will to the draft as described. *Held:* that there was sufficient proof of the will to justify its admission to probate, upon proof of its fraudulent destruction during the lifetime of testatrix. *Id.*

8. One of the witnesses to the will of the decedent had drawn up the will in her presence. This instrument was spoken of by that witness in the hearing and presence of the other witness, and in the presence of the decedent immediately before the execution and attestation, as the will of decedent. She signed it with her mark. Upon the proceedings for the probate of the will the witness who had drawn up the will being dead, the other witness testified that he had signed the will as a witness before the testatrix had made her mark. *Held*, that the will must be admitted to probate, as there was proof of its due execution and attestation, as the testimony of the witness that he had signed before testatrix could be presumed to be erroneous, from the facts, which as appeared by the evidence, accompanied the execution of the will, showing that his recollection of the order in which it was signed was incorrect. *Matter of Kane*, 249.

9. The subscription of a will by the mark of the testator may be proved after evidence of the handwriting of a deceased witness, by the surviving witness, if his testimony convinces the court of its truthfulness. *Id.*

See EXECUTION OF WILL, 1–9.

PROFITS.

See ACCOUNTING, 1, 2.

REJECTION OF CLAIMS.

See CLAIM AGAINST DECEDENT, 3.

RENTS.

See ADMINISTRATOR WITH WILL ANNEXED, 1, 3.

REPAIRS.

Where a house is left by testator to his wife during her life and it becomes necessary to take out the old plumbing and replace it by a new and improved system of plumbing, which is of such a character that it is a permanent improvement, and calculated to be of benefit to the remaindermen, the expense of the change will be apportioned between the life tenant and the remaindermen *pro rata*, taking into consideration the present value of the life estate and the value of the reversionary interest. *Matter of Laytin*, 106.

See ACCOUNTING, 10.

RES ADJUDICATA.

The executors and trustees of the will of testator brought an action in the Supreme Court to obtain a construction thereof. They were authorized by the will to sell in their discretion the real estate and to convert it into money. All legacies were payable on the death of testator's widow who had a life estate in the entire property. In this action the

questions raised by executors and trustees and of which construction was sought were: the time of payment of the legacies, and whether certain legacies to certain institutions were void. All parties in interest, including the heirs, were duly made parties to this action. The court held that the legacies to the institution were void, and also that by virtue of the power of sale given to the executors and trustees the whole estate left by testator became personalty and must be distributed as such, and that as to the void legacies the testator died intestate, and that such excess must be divided among the next of kin of testator. *Held*, that it was within the proper scope of this action to determine what disposition should be made of the estate upon the death of the life tenant, and that the decision of the court that the entire estate was personalty and distributable as such, was binding upon all parties to the action, including the heirs, they not having appealed. *Matter of Vedder*, 548.

SALE OF REAL ESTATE.

1. Upon an application for permission to sell real estate to pay the debts of the decedent, a grantee of an heir can show in opposition thereto that there were other assets besides those contained in the inventory available for the payment of the decedent's debts, though the inventory was filed by the heir who was his grantor. *Matter of Topping*, 187.

2. While ordinarily before a direction is given for the sale of real estate to pay the debts of a decedent, all the personal property of decedent should be applied to the payment of such debts, yet the court can direct a sale in a proper case where all the personal property has not been so applied, or where a part of the debts consists of demands which are doubtful or in litigation. But reasonable diligence to effect the conversion of the assets into money and their application to the payment of the debts is necessary in such case. *Id.*

3. Where it is shown that the administratrix who applies for permission to sell the real estate of decedent for such purpose has made no attempt to collect the proceeds of a sale of some of the decedent's personal property by a former administrator, it not being shown that such an attempt would have been futile, reasonable diligence is not exercised by the administratrix and her application to sell the real estate will be denied. *Id.*

4. A Surrogate obtains jurisdiction to order a sale of the real estate of a decedent for the payment of debts if a petition is filed therefor within three years from the granting of letters of administration, although the citation is not returnable until after such period. *Id.*

5. The words in a will "After my lawful debts are paid, I give," etc., constitute such an express charge upon testator's real estate as will defeat an application for the disposition of such real estate for the payment of debts. Code Civ. Pro., § 2759, subd. 4. *Matter of Hesdra*, 515.

6. The existence of an implied power of sale is, under section 2759, subd. 4, of the Code of Civil Procedure, as effectual as an express power, to

prevent a decree for the disposition of real estate for the payment of debts. *Id.*

7. Where a will, after directing that testator's lawful debts be paid, and giving certain legacies, provides that "the real and personal estate whenever found shall be disposed of as deemed best by my executor" —this latter provision gives to the executor a valid power of sale for the purpose, among others, of the payment of the debts of testator. *Id.*

8. In such case the words "shall be disposed of" are equivalent to "shall be sold," that being evidently under the terms of the will, the disposition contemplated by the testator. *Id.*

REVOCATION OF PROBATE.

1. Where it is sought to set aside and revoke or vacate a decree admitting to probate a will of personal and real property, the proceeding must be taken under subdivision 6 of section 2481 of the Code of Civil Procedure, which authorizes the Surrogate to open, vacate, modify or set aside in certain cases a decree of his court. *Matter of Hamilton*, 268.

2. Such application when made upon the ground of the discovery of a later will, should be made on proper affidavits and should pray for an order that the decree be vacated and that all persons interested may be cited to show cause why such order should not be made. The citation should be directed, not only to the heirs at law and next of kin who were cited to attend the probate, but also to the legatees, if any, who did not belong to either class and were not required to be cited. Upon the return day, if the proofs are sufficient to justify it the decree will be set aside, and the later will, if sufficiently established, admitted to probate. *Id.*

3. The provisions of sections 2647 *et seq.* of the Code do not apply to the revocation of such a will, as they relate exclusively to wills of personal estate only. *Id.*

4. Decedent's widow had originally been his servant with whom he had illicit intercourse; later on she lived as his mistrsss in an apartment which he secured for her, and finally she became by the consummation of a non-ceremonial marriage, as was decided by the Supreme Court, his wife. From the testimony it appeared that the will offered for probate was made while she was living with him, as his mistress: *Held*, that his subsequent marriage, and the birth of issue revoked the will. *Matter of Gall*, 286.

SALE.

See PRACTICE, 9, 10.

STATUTE OF LIMITATIONS.

1. A father mortgaged his farm in 1873, and paid the proceeds thereof to his son, who invested the same. The son paid interest on the mortgage given by the father for some years. Then the son wished to pay

a lower rate of interest, and the father in 1879 executed a new mortgage on his farm, with the proceeds of which last mortgage the son paid off the former one. The son paid interest on the last mortgage until about the time of his death, in 1882. The son's books showed a final settlement in 1879 with his father, and charged him with the payments thereafter made. There was no allusion in the son's books to the mortgage or to his liability under it, but the testimony established the facts above given. *Held*, that the loans were made for the son's benefit, and that the Statute of Limitations did not bar the father's claim against his estate. *Matter of Strickland*, 10.

2. An administrator is bound to set up the bar of the Statute of Limitations when it is available, and will not be allowed on his accounting any sum paid upon a debt which at the time of its payment was barred by the statute. *Matter of Hill*, 25.

3. Under section 2740 of the Code of Civil Procedure, which suspends the running of the Statute of Limitations upon a claim of an executor or administrator against a debt due from the decedent to the accounting party, from the time of the death of the decedent to the first judicial settlement of the account of the executor or administrator, the Statute of Limitations begins to run against such a debt from the time of a judicial settlement of the account of the executor or administrator in proceedings wherein one interested party only, *i. e.*, a legatee of the personalty and life tenant of the real estate, is cited. *Matter of Willard*, 112.

4. The duty of an administrator to account is "an obligation or liability expressed or implied" within the first subdivision of section 382, and the right to compel such an accounting is therefore barred in six years after such right has accrued. *Matter of Nicholls*, 156.

5. The duty of accounting, on the part of an administratrix, exists independently of her obligation in her bond so to do, and application by her bondsmen to compel her to account is not within the provisions of section 381, Code of Civil Procedure, which provide for a limitation of twenty years in an action on a sealed instrument. *Id.*

6. An administrator is not a trustee in any such sense as to prevent the Statute of Limitations running in his favor. *Id.*

7. Where the Statute of Limitations has not barred the claim of an executor or administrator at the time of decedent's death, its running will be suspended until the first judicial settlement of the account of the executor or administrator. *Matter of Macomber*, 279.

8. Where a claim of a creditor has been disputed and rejected, and no other proceeding taken to enforce it within six months after such rejection than the bringing of an action thereon in a court which had not jurisdiction of action brought against the representatives of a decedent, such claim is barred by the short Statute of Limitations. *Matter of Radde*, 293.

9. The collateral inheritance tax being a tax upon the passing of property, section 384 of the Code of Civil Procedure requiring actions brought

to recover a statutory penalty or forfeiture to be brought within two years after the cause of action accrues, has no application to proceedings to compel the payment of such tax. *Matter of Vanderbilt*, 319.

10. A proceeding to compel an administrator to account is barred after six years from the time when, under section 2724 of the Code of Civil Procedure,—namely, one year after the grant of letters of administration, an administrator may be compelled to account. *Matter of Terry*, 536.

11. Section 1819 of the Code of Civil Procedure, providing that an "action" may be maintained for a legacy or distributive share against an executor or administrator who refuses to pay the same on demand, after the expiration of one year from the granting of letters testamentary or letters of administration, and providing that "for the purpose of computing the time within which such an action must be commenced, the cause of action is deemed to accrue when the executor's or administrator's account is judicially settled and not before," applies to actions only and not to special proceedings, and therefore does not give to a legatee the right to cite the executor or administrator to account in the Surrogate's Court, after the Statute of Limitations has run against the legacy. *Id.*

12. In a proceeding to compel an accounting, an administrator does not waive the defence of the Statute of Limitations which he has set up in his answer, by voluntarily filing an account, but such defence may be set up at any time before all the evidence is in. *Id.*

See PRACTICE, 4.

TAXATION.

The fundamental test of the right to tax the devolution of property either by will or in case of intestacy, is to ascertain the sovereign power through whose favor the property is permitted to pass. The power to tax this privilege is commensurate with its dominion over the property. *Matter of Swift*, 644.

See COLLATERAL INHERITANCE TAX.

TEMPORARY ADMINISTRATOR.

The executor of a will, who is the chief beneficiary thereunder, whose relations with most of the testator's heirs and next of kin are unfriendly; who has large unsettled transactions with the estate, and who is charged by the contestants, having exercised undue influence over the testator, should not be appointed temporary administrator, pending the contest of the will. *Matter of Sterns*, 272.

TESTAMENTARY CAPACITY.

1. Decedent executed a will, leaving all his property to charities, to the exclusion of his relatives, except a sum to his executor "large enough to be over and above any bribe that may be offered by my sisters, brothers and children for the redemption of this will, and their heirship to my

estate." The decedent had been many years before in an insane asylum, but had been discharged "improved." He had numerous delusions for a long time prior to his death, believing that his relatives were trying to poison him, that he was threatened by devils, and numerous other delusions, chiefly relating to supposed attempts on his life. He displayed the usual intelligence of people of his condition of life in relation to his business transactions, which were all of a simple character. The subscribing witnesses to the will, who were but slightly acquainted with testator, believed him to be of sound mind at the time of its execution. *Held*, that the testator had not testamentary capacity, and that the probate of the will must be refused. *Matter of Lockwood*, 118.

2. The will of testator was executed June 16, 1887. It complied with the statutory requirements as to execution and the witnesses testified to the essential facts, and that testator was at the time of such execution perfectly sober and rational. At various times prior to the execution of the instrument, extending over a period of about four years, testator was much addicted to drink. In July, 1885, a jury found him to be a habitual drunkard, and that he had been such for two years. He was committed to a State Asylum for the Insane where he remained about eleven months, being then released on trial, but was re-committed to the asylum until the further order of the court. Being released finally, his bad habits continued in 1887. He was twice committed for drunkenness to the Penitentiary on Blackwell's Island in the first part of May, 1887, and had only been discharged from the island the day before the execution of the will. The will bequeathed and devised his entire property to a nephew from whom, and from whose family, he had received kindness. After the execution of the will his bad habits returned, and in 1889 he was several times admitted to hospitals suffering from alcoholism. He died December 29, 1889. There was nothing to show undue influence except the fact that the present will, as well as a previous one, was written under the direction of the sole legatee. During the two years and a half intervening between the execution of the will and his death, testator made several declarations that the will conformed to his wishes. *Held*, that these facts furnished no proof of mental incompetency or undue influence, and that the will should be admitted to probate. *Matter of Reed*, 403.

3. About thirty years before his death testator had an acute attack of insanity, from which he soon recovered. About nine years before his death he had an apoplectic stroke which affected his power of speech and for some five or six years he had suffered from a form of progressive paralysis which affected his powers of locomotion. There was also a gradual weakening of the mental and physical powers incidental to old age. But he conducted his ordinary business affairs with judgment and discretion, and there was not during his lifetime any attempt to have him declared incompetent to manage his affairs. *Held*, that he had testamentary capacity. *Matter of Birdsall*, 433.

4. In cases where from the infirmities of the testator or his impaired men-

tal capacity, the usual inferences cannot be drawn from the formal execution of the will, additional evidence is required, and in such case the burden is cast upon the proponent, especially where one of the witnesses is dead and the other was a comparative stranger to testator, of satisfying the Surrogate beyond a reasonable doubt that testator was capable of executing a will at the time he executed the paper propounded, that he could comprehend the nature of his property, what it was, how situated and also appreciate and perceive the relations of those who were entitled to bounty and benefactions from him. *Matter of Kiedaisch*, 438.

5. It is not necessary that a man should have the capacity to transact all kinds of business to be capable of making a valid will. *Id.*

6. A man whose mental faculties are impaired or weakened even to a considerable degree is not *non compos mentis* within the legal definition of that term applied to making of will. *Id.*

7. The testimony of experts upon the question of mental capacity, although admissible and a great aid to court and jury, can never be held to be controlling as against the testimony of intelligent persons who saw daily the person whose mental condition is in question and had with him transactions of a social and business nature. *Id.*

8. If an aged and infirm testatrix was at the time of the execution of a will, of sound mind and memory, was able to know and retain in her mind the value and extent of her property, and those who were or might be the proper objects of her bounty, and to choose intelligently between them, and uninfluenced by fraud did so choose, then whatever her age or infirmities or however completely she excluded her blood relatives from participation in her bounty, or however intimate her relations may have been with the principal beneficiary, or however great may have been the influence of that beneficiary as the result of kind offices and considerate treatment of deceased, the will made by her must stand. *Matter of Williams*, 570.

TREATY.

1. A treaty between the United States and a foreign power is by virtue of the Constitution of the United States a part of the supreme law of the land and supersedes all local statutes which contravene its provisions. *Matter of Beck*, 355.

2. By the treaty of 1828 between the United States and Prussia it is provided that where upon the death of any person holding real estate within the territories of the one party, such real estate would by the laws of the land descend on the citizen or subject of the other were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same and to withdraw the proceeds without molestation and exempt from all duties of detraction on the part of the government of the respective states. *Held*, that during such reasonable time allowed to a Prussian heir, he has precisely the same rights as he would have were he a resident heir, subject to the obliga-

tion of selling and conveying the fee within such reasonable time to some one capable of holding. *Id.*

3. In the present case by a sale in foreclosure of a decedent's land within about two years and four months after her death a surplus was realized. *Held*, that this was a reasonable time within the treaty with Prussia which would allow the Prussian heirs of decedent to share in this surplus. *Id.*

TRUSTS AND TRUSTEES.

1. To create a trust, the acts or words relied upon must be unequivocal, and where a different interpretation may with equal possibility be placed upon the transaction it will not be proper to draw the inference that a trust is intended which divests the donor of all further ownership of the property. *Matter of Crise*, 59.

2. The testator delivered to one A, who had acted as his agent in various matters, a sum of money, and took from him a receipt, which stated that he had in his possession a specified sum in trust from testator to invest for the benefit of his daughter Mary Ann Hillman, the interest of which only to be paid to her when the testator "thinks she needs it for the benefit of herself or child."

A receipt in the handwriting of A, the agent, was presented to the daughter by the testator, and signed by her. It was a receipt for the specified sum "being an advance by him (testator) of one thousand dollars and interest on same . . . . . to make me equal with advances then made to his other children." This receipt was in possession of the daughter at the time of the death of testator. The paper signed by A, the agent, was left in the daughter's possession for several years, when it was delivered to testator by the daughter, and was subsequently found among the papers of the agent after his decease. At the time of the delivery of this paper, testator said it was money he had left in trust with A, the agent, to make the daughter equal to the other children. The delivery of the receipt by the daughter to her father, if made at all, was subsequent to the delivery of the paper signed by the agent to her. When the receipt was returned to her did not appear. A, the agent, opened an account with the daughter as her trustee, but it did not appear that testator knew of the fact. The daughter never made use of the principal and interest of the money and testator himself used it. *Held*, that these facts did not show a declaration of trust or a gift to or in trust for the daughter in the money. *Id.*

3. Good faith and honesty will not always save a trustee from removal from his office. It is sufficient to justify such removal, that a trustee has failed to charge himself with the rents received by him, both before and after the testator's death; and especially where the evidence shows this to have been done with the intention of concealing from the interested parties the reception of such rents, which intention was persisted in until discovery made its further continuance impossible. *Matter of Smith*, 152.

4. Where money came into the hands of a decedent as a trust fund, and was by him placed with other sums in his own name in bank, and where at his death, he being at that time insolvent, a sum largely in excess of the amount of the trust fund is found on deposit in that bank, and came into the possession of the temporary administrator of decedent, the *cestui que trust* can follow the trust fund and recover it. *Matter of Greene*, 166.

5. Some time before her death, decedent gave to one *F* an order on a savings bank for a specified sum, to be expended by him so far as the same might be necessary to meet the expenses attending her death, to pay funeral expenses, and for enclosing her burial plot and for a suitable headstone; and balance which remained he was to dispose of as he pleased. *F* expended the larger portion of the sum for the purposes indicated, but made no claim to the remainder, and was willing to pay over the same to the executrix of decedent. *Held*, that this was a valid trust and that the executrix upon an accounting could not be charged with the sums paid out by *F*, the trustee, but that she was accountable for the balance in his hands and which he was willing to pay over. *Matter of Conklin*, 176.

6. The statute, L. 1882, chap. 185, providing that in case of the death of the surviving trustee of an express trust, the trust shall devolve on the Supreme Court, relates solely to the case where one being a trustee, as contradistinguished from an executor merely, dies leaving the trust unexecuted. *Matter of Post*, 243.

7. A direction in a will that the residue of the estate of testator be placed in hands of a person named, "to be bestowed in a manner which he may wisely direct," creates a trust which is invalid, because of the absence of a defined beneficiary entitled to enforce its execution, and as to such residue the testator has died intestate. *Matter of Foley*, 298.

8. The will of testatrix contained the following clause:

"I am desirous of leaving some of my estate to aid in carrying on the work of the Christian ministry, and to uphold the doctrine and faith of the Bible, and aid in extending the Christian religion. . . . . I do hereby authorize and empower my executor . . . . . to expend through the agency of the Baptist Church, and its various societies, missionary and educational, or in such other way through the said church or its organizations as shall be deemed best likely to promote these purposes, such sum as he may deem best, but not to exceed $1,000, and, in order that my executor may be enabled to do so without hindrance, I give and bequeath to him the said sum of $1,000, and the sum is to him and his heirs and assigns for the uses and purposes before stated, and I rely on him to carry out the wishes and purposes that I have hereinbefore indicated." *Held*, that this provision was not an absolute bequest, but was a trust which was void for uncertainty as to the beneficiary. *Matter of Ingersoll*, 453.

UNDUE INFLUENCE.

1. Decedent was a man mentally competent but of very weak will and en-

tirely under the domination of his second wife, a woman of boisterous and violent temper, and dissipated habits. Except on rare occasions she refused to permit him to leave the house, and when he went out she nearly always accompanied him. In all important matters his free agency seems to have been overcome. She was positive and aggressive, he was meek and cowardly. Soon after her marriage she announced her purpose to compel her husband to leave his estate to her to the exclusion of his children by his first marriage, one of whom was a helpless imbecile living upon the bounty of decedent's first wife. About three years after the marriage decedent went with his second wife to the office of an attorney and their wills were prepared in accordance with the directions given by her. The will of decedent gave with the exception of insignificant legacies to his children, to his second wife his entire estate, a large part of which was in expectancy and would not vest in him until the death of his mother. At the same time, the second wife who had a property very much larger than decedent's, executed her will leaving all her property to him. The husband lived for six years afterwards without revoking his will. *Held:* That if the scheme of reciprocal wills was concocted by the wife, he acquiesced in it intelligently, understandingly and voluntarily, under the selfish belief that it would be greatly to his advantage if he survived his wife, and that the will must therefore be admitted to probate. *Matter of De Baun*, 304.

2. Testatrix and one of her daughters had lived together for a long time, both being in bad health. Each of them had made wills giving to the survivor a life estate in her property, with the remainder over to the grandsons of testatrix. Another daughter of testatrix was charged by testatrix with undutiful conduct, and was not mentioned in her will. The invalid daughter of testatrix died several months before the mother, but testatrix made no change in her will. Upon several occasions apparently before the execution of her will, testatrix declared that she would have to do as her invalid daughter wanted her to do or else she would not have any peace. There was no evidence to show what led up to these declarations or to what they had reference. *Held*, that there was no proof of undue influence. *Matter of Bedell*, 328.

3. Testator was at the time of the execution of his will about seventy-three years of age. He was very feeble in body and had been for several years so mentally weak as to be unfit to give testimony in a legal proceeding. He had sixteen years before made a will in favor of his wife and her niece, with both of whom he continued on affectionate terms. To neither of them had he expressed any intention of changing his will, nor were there any circumstances which might naturally lead to such a change. The present will, which was drawn up under the direction of proponent, and whose execution was superintended by him, left everything to him, who was an entire stranger in blood. It states that it was made to reward proponent for his services to testator, but there was no proof that he had rendered such services. At the time of the

execution of the will, proponent, who had entire charge of the property of testator, had obtained complete dominion over him, and sustained to him the closest confidential relationship. Although opportunity was offered him, proponent did not explain the suspicious circumstances surrounding his conduct. *Held*, that in such case the law presumes undue influence, and that it was incumbent upon the proponent to satisfy the court that undue influence had not been exerted. *Further held*, that in the absence of such proof by proponent the will would not be admitted to probate. *Matter of Monroe*, 395.

4. Testator died leaving property of the value of $10,000. Before his second marriage, which was seventeen years before his death, he had given to each of his three daughters by his first wife, who were married and had separate homes of their own, the sum of $3,000. By his will he left to his second wife a legacy of $5,000. *Held*, that this legacy was not so unreasonably large as to raise a presumption of undue influence. *Matter of Birdsall*, 433.

5. It was shown that testatrix was about eighty-two years of age, was quite deaf and somewhat feeble in health. The memorandum for the will was prepared by the principal beneficiary without the presence or knowledge of any other person, so far as appears. There had existed between testatrix and the beneficiary the most tender relations, existing for years, amounting almost to those between mother and daughter, and growing closer as time progressed. The said beneficiary was not a relative either by blood or affinity. The blood relatives, heirs at law and next of kin of the deceased were not mentioned in the will, although deceased had frequently said she expected a portion of the property to go to them. These circumstances, it was claimed by contestants, established that the alleged will was the result of moral coercion amounting to fraud. *Held*, that there was not sufficient proof of undue influence. *Matter of Williams*, 579.

6. Undue influence must be an influence exercised by coercion, imposition or fraud, and not such as arises from gratitude, affection or esteem, and its exertion upon the very act charged to have been effected by it must be proved. It will not be inferred from interest and opportunity, and if on the other hand there is adduced proof of capacity, mature deliberation, settled purpose and absence of fraud and imposition, the will must be deemed to be the exercise of personal right and be respected accordingly. *Matter of Williams*, 579.

See TESTAMENTARY CAPACITY, 2.

VOUCHER.

A voucher in proper form filed by an executor, to support an alleged payment, may be impeached by showing that a portion only of the amount therein stated has been paid, and the validity of the voucher cannot be sustained by showing that in fact the executor is liable for the remainder of the sum therein stated. *Matter of Butler*, 572.

WIDOW.

1. Under chapter 408 of the Laws of 1889 it is the duty of an appraiser of the estate of a decedent to set aside to the widow a life estate in real estate of the value of one thousand dollars, and one hundred and fifty dollars of the personal estate; but if upon computation, the present value of the life estate in the realty and of the dower interest therein, these sums in addition to the one hundred and fifty dollars of the personal estate do not aggregate one thousand dollars, sufficient personal estate must be set apart to the widow to make up that amount. *Matter of Daggett*, 230.

2. The words of the statute "in addition to the dower rights," etc., are not words of exclusion. *Id.*

3. The widow takes the portion of the estate set aside for her under the statute free from the claims of the creditors of the decedent. *Id.*

4. By section one of chapter 406 of Laws of 1889, the widow of a decedent who dies intestate leaving a widow and descendants has a life interest in real estate of the value of one thousand dollars, in addition to her dower. By section two of the same act it is provided that in such case, in addition to the articles declared to be exempt from appraisal by 2 *Rev. Stat.*, chap. 6, tit. 3, § 9, there should be set apart to such widow and children personal property of the value of one hundred and fifty dollars; and if her interest in the real estate of her deceased husband together with the dower right and the said one hundred and fifty dollars should be less than one thousand dollars, then said appraisers should set apart for her use personal property which together with said real estate should amount to one thousand dollars in value. *Held*, that the widow is under this statute entitled to so much personal property as together with the interest in the real estate and the one hundred and fifty dollars amount to the sum of one thousand dollars, and that in fixing this amount her dower in the real estate is not to be considered. *Matter of Tipple*, 508.

See DIVORCE, 1-2.

WILLS.

1. Where decedent willed one fourth part of his residuary estate to his executor "to be devoted by him to and for a certain purpose made known unto said executor by a certain letter dated," etc., "written by me to my said executor, and bearing" a specified date, "said letter to form a part of this my will," and no such letter has been found, it must be held that the decedent died intestate, as to that part of his estate.

Further held, that the non-production of the letter does not invalidate the will as to the other three fourths of the residuary estate. *Matter of Frey*, 70.

2. The testator bequeathed to his wife, absolutely, his household furniture, and in another clause of the will bequeathed and devised to her "all the residue and remainder of my real and personal estate, to be used for her personal benefit during her natural life." By the same clause

the executor was authorized, with the advice and consent of the wife, to sell any part or all the real and personal estate of testator, the use of the money arising therefrom to be given to the wife for her benefit and support during her natural life. After her death, certain legacies were given to testator's daughters, the remainder of the estate to be divided among all his heirs. The payment of the legacies after the widow's death would nearly exhaust the whole of the residuary estate. *Held*, that the widow was entitled only to the use or income of the residuary estate during life, and that it was the duty of the executor to preserve the principal for distribution to the legatees after the widow's death. *Matter of Millard*, 91.

3 By his will testator gave to his wife all his property, to have, hold, possess, use and control the same for her own personal benefit during her life, and at her death all that might then remain to seven specified children. The executors were given full power and authority to sell and convey any portion of the real estate, on condition that such sale be approved of and concurred in by testator's wife. The will also provided that the appointment of appraisers at testator's death should not be required, that the whole management of the property should immediately vest in the wife, and be subject to her absolute control during her life, and that she should not be subject to any accounting therefor. *Held*, that the wife took only a life interest and use of the property of testator, to hold the same in trust for her necessary support and maintenance; that the provisions declaring the estate not subject to an accounting were nugatory and void, as contrary to law and to the whole text of the will. *Matter of Gilbert*, 390.

4. A drunkard may make a valid will even if at the time of its execution he is under the influence of liquor, provided he comprehends the nature, extent and disposition of his estate, his relations to those who have, or who might have, a claim upon his bounty, and is free from undue influence, fraud or coercion. *Matter of Reed*, 403.

5. The will of testatrix contained the following clause:

"I am desirous of leaving some of my estate to aid in carrying on the work of the Christian ministry, and to uphold the doctrine and faith of the Bible, and aid in extending the Christian religion. . . . . I do hereby authorize and empower my executor . . . . . to expend through the agency of the Baptist Church, and its various societies, missionary and educational, or in such other way through the said church or its organizations as shall be deemed best likely to promote these purposes, such sum as he may deem best, but not to exceed $1,000, and, in order that my executor may be enabled to do so without hindrance, I give and bequeath to him the said sum of $1,000, and the sum is to him and his heirs and assigns for the uses and purposes before stated, and I rely on him to carry out the wishes and purposes that I have hereinbefore indicated." *Held*, that this provision was not an absolute bequest, but was a trust which was void for uncertainty as to the beneficiary. *Matter of Ingersoll*, 453.

6. The will of testator gave to his wife "during her widowhood, the use of all my real and personal estate, authorizing her to sell and dispose of any of my real estate, as to her shall seem just, giving and executing all deeds and writings necessary to secure the purchasers in all rights of ownership in the same manner as I could have done if living." The will further directed that upon the death of the wife the estate should be divided between the two daughters of testator, and that for such purpose, the executors were directed to then hold the estate in trust for them, paying to each daughter during her life the income of one half of said estate, and at the death of each daughter it was provided that her one half share was to be divided among her heirs as they should attain the age of twenty-one years. *Held*, that the widow took simply a life-interest which entitled her to the use or income of the estate during life or widowhood, with the power of sale of the real estate; that upon her death or the determination of her widowhood, the estate both real and personal, passed as directed in the will, without any other diminution or impairment than that resulting from unavoidable loss or depreciation, which in the exercise of ordinary care, prudence and judgment, the widow in the enjoyment of her estate, could not prevent. *Matter of Blauvelt*, 458.

7. Testator by his will, bequeathed and devised his residuary estate in trust to his executors, to pay one third of the net income to his wife. The will directed further, "On my eldest child attaining the age of twenty-five years, if my said wife shall not then be living and in case my said wife is living at that time, then upon her death, to sell and convert my said estate into cash, and to pay and divide the proceeds thereof to and among my children, share and share alike, the issue of any deceased child to take the share the parent would have taken, if living. In case my son shall desire to go into business before attaining twenty-five years of age, my executrix and executors may, in their discretion, advance to him, upon his share in my estate, such sum as to them may seem meet and proper." Subsequent to the death of the testator, one of his children, M., who had married during his lifetime, died leaving her surviving a child who thereafter died, leaving as his only heir and next of kin, his father. *Held*, that each child or the issue of a deceased child took, on the testator's death, a vested estate in an undivided one fourth part of his property, descendible on the death of any child to its heirs or next of kin, and that the husband of the deceased daughter, M., was not only entitled as the administrator of his wife, to receive whatever income became due and payable to her before her death, and also to whatever income became due and payable to his son before the latter's death, but that he is entitled to future income, and to share in the residuary estate at the expiration of the trust. *Matter of Meikle*, 97.

8. A clause in the will of testator which provides that after the payment of testator's debts "if anything is left from the personal property it shall be equally divided between my children share and share alike" does

not apply to growing crops on land specifically devised. *Matter of Clemans*, 237.

9. Where a will directs the investment of a specified sum; that the income thereof be paid to the life-tenant and that at his death the principal be divided among certain named persons in specified shares, the remaindermen in such case take a vested remainder at the death of the testator, and in case of the death of any one of the remaindermen prior to that of the life-tenant the personal representatives of such deceased remaindermen are entitled to his share upon the death of the life-tenant. *Matter of Post*, 243.

10. Decedent's widow had originally been his servant with whom he had illicit intercourse; later on she lived as his mistress in an apartment which he secured for her, and finally she became by the consummation of a non-ceremonial marriage, as was decided by the Supreme Court, his wife. From the testimony it appeared that the will offered for probate was made while she was living with him, as his mistress: *Held*, that his subsequent marriage, and the birth of issue revoked the will. *Matter of Gall*, 286.

11. A direction in a will that the residue of the estate of testator be placed in hands of a person named, "to be bestowed in a manner which he may wisely direct," creates a trust which is invalid, because of the absence of a defined beneficiary entitled to enforce its execution, and as to such residue the testator has died intestate. *Matter of Foley*, 298.

12. Under the law, the injustice of a competent testator towards the natural objects of his loving kindness and bounty cannot affect the validity of his will. *Matter of De Baun*, 304.

13. Where by one clause of his will a testator gives to one of his sons the use of a specified sum of money during his life, the principal upon the death of the son to be paid to his children, and in another clause there is bequeathed to a daughter "any legacy herein given which may from any cause lapse:" *Held*, that at the death of testator, the daughter took a contingent interest which, she having died before the termination of the life estate, at the death of the life beneficiary vested absolutely in her representatives. *Matter of Mapes*, 350.

14. Testatrix, who died leaving her surviving a husband, mother and two children, provided in her will as follows: "I, having heretofore advanced money to my son Burke L. Sherman, to a larger amount than I am now able to give to my daughter Abba, and there being a sum of money coming to me from my father's estate now deceased, at the death of my mother, which as I understand will go to my two said children in equal amounts in case I should die before my mother, two children me surviving, I request my son, Burke L. Sherman to give his share to his sister Abba to be used for her education and maintenance." The mother of testatrix died after her. *Held*, that testatrix died intestate as to this fund, that the provision of the will raised a presumption that there had been advancements to the son, which threw on the son the

burden of showing that there had been such a change of circumstances as to avoid such presumption. In the absence of such proof by the son, the fund referred to should be divided in the proportions of two thirds to the daughter and one third to the husband. *Matter of Sherman*, 504.

15. The words in a will "After my lawful debts are paid, I give," etc., constitute such an express charge upon testator's real estate as will defeat an application for the disposition of such real estate for the payment of debts. Code Civ. Pro., § 2759, subd. 4. *Matter of Hesdra*, 515.

16. Where a will, after directing that testator's lawful debts be paid, and giving certain legacies, provides that "the real and personal estate whenever found shall be disposed of as deemed best by my executor" —this latter provision gives to the executor a valid power of sale for the purpose, among others, of the payment of the debts of testator. *Id.*

17. In such case the words "shall be disposed of" are equivalent to "shall be sold," that being evidently under the terms of the will, the disposition contemplated by the testator. *Id.*

18. Testatrix, a married woman, executed a will in this state. Thereafter and while still a resident of this state she had two children. Afterwards removing with her husband and children to the state of Rhode Island, she there had another child and died a resident of that state. Her entire property consisted of personal property in this state. The laws of both New York (4 Rev. Stat., 8th ed., p. 2549, § 49) and those of Rhode Island (Pub. St., title 24, chap. 182, § 12) provide that a child born after the making of a will in which no provision is made for him, shall have the same interest in the estate of his parent as if the parent had died intestate. Testatrix at her death left a husband who under both the laws of New York and Rhode Island would in case of intestacy have taken the whole of the personal estate. Testatrix left however a will disposing of all her personal property: *Held*, that in such case the children of testatrix would have taken nothing had their mother died intestate, and therefore were entitled to no part of the bequeathed estate, and that such estate should be distributed in accordance with the terms of the will. *Matter of Witter*, 530.

See EXECUTION OF WILL; PROBATE OF WILL.

WITHHOLDING.

Where a person has taken possession of certain personal property belonging to the estate of a decedent, and which he has delivered to others, under a claim that he has done so in accordance with the wishes of decedent, the burden is on such person to show that such property is not still under his control, and in the absence of such proof, his failure to repair his former illegal action is a withholding. The law presumes every act in itself unlawful, to have been wrongfully intended until the contrary appears. In such a case, where the respondent is an interloper, who gained control illegally of the property, and has unwillingly disclosed information with reference to its existence and whereabouts,

and was disingenuous in answering interrogatories of examining counsel, such person may be charged with the costs of the proceeding to discover the property. *Matter of Nickerson*, 6.

WITNESS TO WILL.

See EXECUTION of WILL, 1, 3, 4, 5, 6, 7, 8; PROBATE OF WILL, 1, 3, 8.

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execution of the will, proponent, who had entire charge of the property of testator, had obtained complete dominion over him, and sustained to him the closest confidential relationship. Although opportunity was offered him, proponent did not explain the suspicious circumstances surrounding his conduct. *Held*, that in such case the law presumes undue influence, and that it was incumbent upon the proponent to satisfy the court that undue influence had not been exerted. *Further held*, that in the absence of such proof by proponent the will would not be admitted to probate. *Matter of Monroe*, 395.

4. Testator died leaving property of the value of $10,000. Before his second marriage, which was seventeen years before his death, he had given to each of his three daughters by his first wife, who were married and had separate homes of their own, the sum of $3,000. By his will he left to his second wife a legacy of $5,000. *Held*, that this legacy was not so unreasonably large as to raise a presumption of undue influence. *Matter of Birdsall*, 433.

5. It was shown that testatrix was about eighty-two years of age, was quite deaf and somewhat feeble in health. The memorandum for the will was prepared by the principal beneficiary without the presence or knowledge of any other person, so far as appears. There had existed between testatrix and the beneficiary the most tender relations, existing for years, amounting almost to those between mother and daughter, and growing closer as time progressed. The said beneficiary was not a relative either by blood or affinity. The blood relatives, heirs at law and next of kin of the deceased were not mentioned in the will, although deceased had frequently said she expected a portion of the property to go to them. These circumstances, it was claimed by contestants, established that the alleged will was the result of moral coercion amounting to fraud. *Held*, that there was not sufficient proof of undue influence. *Matter of Williams*, 579.

6. Undue influence must be an influence exercised by coercion, imposition or fraud, and not such as arises from gratitude, affection or esteem, and its exertion upon the very act charged to have been effected by it must be proved. It will not be inferred from interest and opportunity, and if on the other hand there is adduced proof of capacity, mature deliberation, settled purpose and absence of fraud and imposition, the will must be deemed to be the exercise of personal right and be respected accordingly. *Matter of Williams*, 579.

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A voucher in proper form filed by an executor, to support an alleged payment, may be impeached by showing that a portion only of the amount therein stated has been paid, and the validity of the voucher cannot be sustained by showing that in fact the executor is liable for the remainder of the sum therein stated. *Matter of Butler*, 572.

WIDOW.

1. Under chapter 408 of the Laws of 1889 it is the duty of an appraiser of the estate of a decedent to set aside to the widow a life estate in real estate of the value of one thousand dollars, and one hundred and fifty dollars of the personal estate; but if upon computation, the present value of the life estate in the realty and of the dower interest therein, these sums in addition to the one hundred and fifty dollars of the personal estate do not aggregate one thousand dollars, sufficient personal estate must be set apart to the widow to make up that amount. *Matter of Daggett*, 230.

2. The words of the statute "in addition to the dower rights," etc., are not words of exclusion. *Id.*

3. The widow takes the portion of the estate set aside for her under the statute free from the claims of the creditors of the decedent. *Id.*

4. By section one of chapter 406 of Laws of 1889, the widow of a decedent who dies intestate leaving a widow and descendants has a life interest in real estate of the value of one thousand dollars, in addition to her dower. By section two of the same act it is provided that in such case, in addition to the articles declared to be exempt from appraisal by 2 *Rev. Stat.*, chap. 6, tit. 3, § 9, there should be set apart to such widow and children personal property of the value of one hundred and fifty dollars; and if her interest in the real estate of her deceased husband together with the dower right and the said one hundred and fifty dollars should be less than one thousand dollars, then said appraisers should set apart for her use personal property which together with said real estate should amount to one thousand dollars in value. *Held*, that the widow is under this statute entitled to so much personal property as together with the interest in the real estate and the one hundred and fifty dollars amount to the sum of one thousand dollars, and that in fixing this amount her dower in the real estate is not to be considered. *Matter of Tipple*, 508.

See DIVORCE, 1-2.

WILLS.

1. Where decedent willed one fourth part of his residuary estate to his executor "to be devoted by him to and for a certain purpose made known unto said executor by a certain letter dated," etc., "written by me to my said executor, and bearing" a specified date, "said letter to form a part of this my will," and no such letter has been found, it must be held that the decedent died intestate, as to that part of his estate.

Further held, that the non-production of the letter does not invalidate the will as to the other three fourths of the residuary estate. *Matter of Frey*, 70.

2. The testator bequeathed to his wife, absolutely, his household furniture, and in another clause of the will bequeathed and devised to her "all the residue and remainder of my real and personal estate, to be used for her personal benefit during her natural life." By the same clause

the executor was authorized, with the advice and consent of the wife, to sell any part or all the real and personal estate of testator, the use of the money arising therefrom to be given to the wife for her benefit and support during her natural life. After her death, certain legacies were given to testator's daughters, the remainder of the estate to be divided among all his heirs. The payment of the legacies after the widow's death would nearly exhaust the whole of the residuary estate. *Held*, that the widow was entitled only to the use or income of the residuary estate during life, and that it was the duty of the executor to preserve the principal for distribution to the legatees after the widow's death. *Matter of Millard*, 91.

3 By his will testator gave to his wife all his property, to have, hold, possess, use and control the same for her own personal benefit during her life, and at her death all that might then remain to seven specified children. The executors were given full power and authority to sell and convey any portion of the real estate, on condition that such sale be approved of and concurred in by testator's wife. The will also provided that the appointment of appraisers at testator's death should not be required, that the whole management of the property should immediately vest in the wife, and be subject to her absolute control during her life, and that she should not be subject to any accounting therefor. *Held*, that the wife took only a life interest and use of the property of testator, to hold the same in trust for her necessary support and maintenance; that the provisions declaring the estate not subject to an accounting were nugatory and void, as contrary to law and to the whole text of the will. *Matter of Gilbert*, 390.

4. A drunkard may make a valid will even if at the time of its execution he is under the influence of liquor, provided he comprehends the nature, extent and disposition of his estate, his relations to those who have, or who might have, a claim upon his bounty, and is free from undue influence, fraud or coercion. *Matter of Reed*, 403.

5. The will of testatrix contained the following clause:
"I am desirous of leaving some of my estate to aid in carrying on the work of the Christian ministry, and to uphold the doctrine and faith of the Bible, and aid in extending the Christian religion. . . . . I do hereby authorize and empower my executor . . . . . to expend through the agency of the Baptist Church, and its various societies, missionary and educational, or in such other way through the said church or its organizations as shall be deemed best likely to promote these purposes, such sum as he may deem best, but not to exceed $1,000, and, in order that my executor may be enabled to do so without hindrance, I give and bequeath to him the said sum of $1,000, and the sum is to him and his heirs and assigns for the uses and purposes before stated, and I rely on him to carry out the wishes and purposes that I have hereinbefore indicated." *Held*, that this provision was not an absolute bequest, but was a trust which was void for uncertainty as to the beneficiary. *Matter of Ingersoll*, 453.

6. The will of testator gave to his wife "during her widowhood, the use of all my real and personal estate, authorizing her to sell and dispose of any of my real estate, as to her shall seem just, giving and executing all deeds and writings necessary to secure the purchasers in all rights of ownership in the same manner as I could have done if living." The will further directed that upon the death of the wife the estate should be divided between the two daughters of testator, and that for such purpose, the executors were directed to then hold the estate in trust for them, paying to each daughter during her life the income of one half of said estate, and at the death of each daughter it was provided that her one half share was to be divided among her heirs as they should attain the age of twenty-one years. *Held*, that the widow took simply a life-interest which entitled her to the use or income of the estate during life or widowhood, with the power of sale of the real estate; that upon her death or the determination of her widowhood, the estate both real and personal, passed as directed in the will, without any other diminution or impairment than that resulting from unavoidable loss or depreciation, which in the exercise of ordinary care, prudence and judgment, the widow in the enjoyment of her estate, could not prevent. *Matter of Blauvelt*, 458.

7. Testator by his will, bequeathed and devised his residuary estate in trust to his executors, to pay one third of the net income to his wife. The will directed further, "On my eldest child attaining the age of twenty-five years, if my said wife shall not then be living and in case my said wife is living at that time, then upon her death, to sell and convert my said estate into cash, and to pay and divide the proceeds thereof to and among my children, share and share alike, the issue of any deceased child to take the share the parent would have taken, if living. In case my son shall desire to go into business before attaining twenty-five years of age, my executrix and executors may, in their discretion, advance to him, upon his share in my estate, such sum as to them may seem meet and proper." Subsequent to the death of the testator, one of his children, M., who had married during his lifetime, died leaving her surviving a child who thereafter died, leaving as his only heir and next of kin, his father. *Held*, that each child or the issue of a deceased child took, on the testator's death, a vested estate in an undivided one fourth part of his property, descendible on the death of any child to its heirs or next of kin, and that the husband of the deceased daughter, M., was not only entitled as the administrator of his wife, to receive whatever income became due and payable to her before her death, and also to whatever income became due and payable to his son before the latter's death, but that he is entitled to future income, and to share in the residuary estate at the expiration of the trust. *Matter of Meikle*, 97.

8. A clause in the will of testator which provides that after the payment of testator's debts "if anything is left from the personal property it shall be equally divided between my children share and share alike" does

not apply to growing crops on land specifically devised. *Matter of Clemans*, 237.

9. Where a will directs the investment of a specified sum; that the income thereof be paid to the life-tenant and that at his death the principal be divided among certain named persons in specified shares, the remaindermen in such case take a vested remainder at the death of the testator, and in case of the death of any one of the remaindermen prior to that of the life-tenant the personal representatives of such deceased remaindermen are entitled to his share upon the death of the life-tenant. *Matter of Post*, 243.

10. Decedent's widow had originally been his servant with whom he had illicit intercourse; later on she lived as his mistress in an apartment which he secured for her, and finally she became by the consummation of a non-ceremonial marriage, as was decided by the Supreme Court, his wife. From the testimony it appeared that the will offered for probate was made while she was living with him, as his mistress: *Held*, that his subsequent marriage, and the birth of issue revoked the will. *Matter of Gall*, 286.

11. A direction in a will that the residue of the estate of testator be placed in hands of a person named, "to be bestowed in a manner which he may wisely direct," creates a trust which is invalid, because of the absence of a defined beneficiary entitled to enforce its execution, and as to such residue the testator has died intestate. *Matter of Foley*, 208.

12. Under the law, the injustice of a competent testator towards the natural objects of his loving kindness and bounty cannot affect the validity of his will. *Matter of De Baun*, 304.

13. Where by one clause of his will a testator gives to one of his sons the use of a specified sum of money during his life, the principal upon the death of the son to be paid to his children, and in another clause there is bequeathed to a daughter "any legacy herein given which may from any cause lapse:" *Held*, that at the death of testator, the daughter took a contingent interest which, she having died before the termination of the life estate, at the death of the life beneficiary vested absolutely in her representatives. *Matter of Mapes*, 350.

14. Testatrix, who died leaving her surviving a husband, mother and two children, provided in her will as follows: "I, having heretofore advanced money to my son Burke L. Sherman, to a larger amount than I am now able to give to my daughter Abba, and there being a sum of money coming to me from my father's estate now deceased, at the death of my mother, which as I understand will go to my two said children in equal amounts in case I should die before my mother, two children me surviving, I request my son, Burke L. Sherman to give his share to his sister Abba to be used for her education and maintenance." The mother of testatrix died after her. *Held*, that testatrix died intestate as to this fund, that the provision of the will raised a presumption that there had been advancements to the son, which threw on the son the

burden of showing that there had been such a change of circumstances as to avoid such presumption. In the absence of such proof by the son, the fund referred to should be divided in the proportions of two thirds to the daughter and one third to the husband. *Matter of Sherman*, 504.

15. The words in a will "After my lawful debts are paid, I give," etc., constitute such an express charge upon testator's real estate as will defeat an application for the disposition of such real estate for the payment of debts. Code Civ. Pro., § 2759, subd. 4. *Matter of Hesdra*, 515.

16. Where a will, after directing that testator's lawful debts be paid, and giving certain legacies, provides that "the real and personal estate whenever found shall be disposed of as deemed best by my executor" —this latter provision gives to the excutor a valid power of sale for the purpose, among others, of the payment of the debts of testator. *Id.*

17. In such case the words "shall be disposed of" are equivalent to "shall be sold," that being evidently under the terms of the will, the disposition contemplated by the testator. *Id.*

18. Testatrix, a married woman, executed a will in this state. Thereafter and while still a resident of this state she had two children. Afterwards removing with her husband and children to the state of Rhode Island, she there had another child and died a resident of that state. Her entire property consisted of personal property in this state. The laws of both New York (4 Rev. Stat., 8th ed., p. 2549, § 49) and those of Rhode Island (Pub. St., title 24, chap. 182, § 12) provide that a child born after the making of a will in which no provision is made for him, shall have the same interest in the estate of his parent as if the parent had died intestate. Testatrix at her death left a husband who under both the laws of New York and Rhode Island would in case of intestacy have taken the whole of the personal estate. Testatrix left however a will disposing of all her personal property: *Held*, that in such case the children of testatrix would have taken nothing had their mother died intestate, and therefore were entitled to no part of the bequeathed estate, and that such estate should be distributed in accordance with the terms of the will. *Matter of Witter*, 530.

See EXECUTION OF WILL; PROBATE OF WILL.

WITHHOLDING.

Where a person has taken possession of certain personal property belonging to the estate of a decedent, and which he has delivered to others, under a claim that he has done so in accordance with the wishes of decedent, the burden is on such person to show that such property is not still under his control, and in the absence of such proof, his failure to repair his former illegal action is a withholding. The law presumes every act in itself unlawful, to have been wrongfully intended until the contrary appears. In such a case, where the respondent is an interloper, who gained control illegally of the property, and has unwillingly disclosed information with reference to its existence and whereabouts,